Insolvency Litigation and the Jackson Reforms – An Update

A report commissioned by R3 (with the support of ACCA, ICAEW, ICAS, ILA, IPA, IRS, JLT Specialty Ltd, Willis Taylor Watson)

By Professor Peter Walton
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Professor Walton has taught at the University of Wolverhampton for over twenty years. He is a Professor of Insolvency Law and for many years was the Course Director of the Legal Practice Course. He is currently the Director of the University's Law Research Centre. He has published widely on all aspects of insolvency law and his work has been quoted by the New Zealand Law Commission, cited by the New Zealand High Court, cited in argument in the Privy Council and been relied upon by the UK Supreme Court. He co-authors, with Professor Andrew Keay of Leeds University, a well-received textbook entitled ***Insolvency Law: Corporate and Personal*** published by Jordans and is the General Editor of ***Totty, Moss and Segal on Insolvency*** published by Sweet & Maxwell.

The 'Jackson' Research Committee

This report would not have been possible without the support and guidance of:

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Glossary of Terms

Jackson Reforms: reforms recommended by Lord Justice Jackson in his Review of Civil Litigation Costs and brought into effect by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Insolvency Litigation: actions brought by liquidators, administrators and trustees in bankruptcy.

Conditional Fee Arrangements (CFAs): agreements between a lawyer and client where the lawyer receives payment of his or her own fees only if the action is successful. The agreement will usually also provide for the lawyer to benefit from a percentage uplift when the case is won limited to 100% of base fees and subject to assessment by the court at the request of the paying party.

After the Event (ATE) Insurance: an insurance policy which covers one party against the risk of having to pay the opposing party's legal costs in the event that the action fails.

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Foreword

The world of insolvency litigation has moved on significantly since my first report in April 2014 which considered Government data from 2010 as well as the results of an insolvency practitioner survey from the summer of 2013.

The much publicised two year insolvency exemption or "carve-out" from the Jackson reforms was due to end in April 2015 but was subsequently pushed back to an initially indeterminate date. In the run-up to Christmas 2015 the Ministry of Justice announced the abolition of the exemption would finally happen in April 2016.

My first report suggested that despite a burgeoning third party funding market, its development in the area of insolvency litigation was still in its early stages. No realistic alternatives were identified which would be able to take up the slack in the system created by the loss of the insolvency carve-out from the Jackson reforms.

The data explained in my first report was considered by many stakeholders. There were Parliamentary Early Day Motions based upon it. Letters were written by business representative groups and professional bodies to, amongst others, the Prime Minister and the Secretary of State for Justice. Questions were asked in Parliament. Suggested amendments were put forward to legislation as it passed through Parliament. Lord Justice Jackson re-entered the debate.

No further empirical evidence has been produced to shed light on how the insolvency litigation market has moved on. I was therefore very pleased when this update was commissioned as it permitted me to take another look at the issue. The evidence shows a remarkable increase in insolvency litigation activity both by insolvency practitioners and third party funders.

The loss of the insolvency carve-out takes away a very useful tool which, in recent years, has been increasingly utilised by insolvency practitioners. The Government has made some statutory changes directed at encouraging insolvency litigation and no doubt third party funders will step in to pick up some of the slack. Nevertheless, it is unlikely that there will be the same level of insolvency litigation after April 2016. Looking overseas for inspiration, there are other options which might be considered. It is heartening that the Government is committed to a review of the Jackson reforms prior to April 2018. Only time will tell what effect the loss of the insolvency carve-out has on the ability of the profession to call wrong-doers to account for their actions and what effect this has on creditors (including most significantly HMRC) and the wider economy.

Professor Peter Walton,

University of Wolverhampton,

April 2016

Executive summary

Key findings

- CFA-backed insolvency litigation was used in 2014 to pursue claims whose value was likely to be in excess of **£1bn** - up from **£300m** in 2010.
- Approximately **£240m** of these claims relate to money owed to HMRC – up from **£50-70m** in 2010.
- CFA use in insolvency litigation (in compulsory liquidation cases) **rose 39%** from 2010 to 2014, while the total number of compulsory liquidations fell 22%.
- The median average value of the insolvent estate (in compulsory liquidation cases in 2014), where CFA-backed litigation was pursued, was a **debit balance of £598**.
- CFA-backed insolvency litigation realised approximately **£500m** per year for insolvent estates (up from **£160m** in 2013), with around **£120m** of this owed to HMRC (based upon a survey of R3 members).
- Third party funding is a relatively small part of the insolvency litigation market: approximately **160** cases per year use third party funding, realising **£50m** – compared to a total of approximately **2,300** cases per year and around **£500m** of realisations in cases using CFAs.
- Without the insolvency litigation exemption from the LASPO Act, **51%** of appointment takers say **none** of their cases would have gone ahead.
- Impact of the end of the exemption:
    - **86%** of respondents to the survey believe that less money will be returned to creditors;
    - **63%** will take on fewer ‘no asset’ cases;
    - **49%** will stop or decrease litigation;
    - **54%** will seek to use third party funders; **52%** of survey respondents have never used third party funding.
    - **22%** will seek to use Damages Based Agreements; **90%** of survey respondents have never used a Damages Based Agreement.

1 Introduction

In 2013, the Jackson Reforms[1] came into force and made significant changes to how civil litigation is conducted in the United Kingdom. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') gave effect to those Reforms making changes to both law and procedure. LASPO, *inter alia*, generally abolished the right for successful claimants to claim, from a losing defendant, any uplift on a conditional fee agreement ('CFA') and the premium payable for after-the-event insurance (a policy taken out to safeguard against the possibility of suffering an adverse costs order if the claim was unsuccessful).[2]

Although the Jackson Reforms were intended to apply to all types of civil litigation, the then Government recognised that there were specific types of litigation whose characteristics made them different to typical civil litigation. Due to this recognition, insolvency litigation[3] was granted an exemption from the Reforms which, when announced, was intended to operate only for two years and therefore to be repealed by April 2015. This two year limit on the insolvency "carve-out" was initially extended for an indefinite time pending further consideration by the Government[4] which subsequently announced it would come to an end in April 2016.[5]

The Jackson Reforms were based upon a great deal of empirical evidence, but there was very little consideration of the likely impact of the Reforms on insolvency litigation specifically.[6] In order to assist in filling this gap in the available data, R3 (with the support of ACCA, ICAEW, ICAS, IPA, JLT Specialty Ltd, Moon Beever and Moore Stephens LLP) commissioned the author to conduct empirical research in an attempt to provide as clear a picture as possible as to how insolvency litigation was conducted and to assess as far as was possible, the likely effect of the Jackson Reforms on insolvency litigation. This research was conducted towards the end of 2013 and *The Likely Effect of the Jackson Reforms on Insolvency Litigation – an Empirical Investigation* ('the Walton Report')[7] was published in April 2014. The Walton Report was subsequently cited in

1 The Reforms are based upon Lord Justice Jackson's recommendations found in *Review of Civil Litigation Costs: Final Report* TSO (December 2009) (see also the *Review of Civil Litigation Costs: Preliminary Report Volumes One and* Two TSO (May 2009) and the Government's subsequent consultation *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations* (Cm 7947, November 2010) and its response to the results of that *consultation Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations - The Government Response* (Cm 8041, March 2011).

2 These specific changes were made by amendments to the Access to Justice Act 1999.

3 In this context insolvency litigation in general terms refers to litigation brought by liquidators or administrators of companies or trustees in bankruptcy. See Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 5 and Saving Provision) Order 2013 SI 2013/77 art 4 and the Ministerial Statement dated 24th May 2012 by the then Minister of Justice Jonathan Djanogly.

4 See the written statement by Lord Faulks QC, the Minister of State for Civil Justice on 26th February 2015.

5 The announcement was made on 17th December 2015 by Lord Faulks QC, the Minister of State for Civil Justice and may be found at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-12-17/HCWS420/. The Government is committed to a Post Implementation Review of LASPO between April 2016 and April 2018. The Review will take place towards the end of the period.

6 Although a number of Parliamentary Written Questions have been answered in terms which suggest the issue of insolvency litigation was considered in the Parliamentary LASPO Impact Assessment, that would not appear to be the case (see for example, the answers to Written Questions 13344, 13345, 13342, 13343, 13333, 15406 provided by Dominic Raab MP, Parliamentary Under-Secretary (Ministry of Justice) in November 2015.

7 A report commissioned by R3 (with the support of ACCA, ICAEW, ICAS, IPA, JLT Specialty Ltd, Moon Beever and Moore Stephens LLP) which may be found at: https://www.r3.org.uk/media/documents/policy/Jackson_Campaign/Jackson_Reforms_Insolvency_Litigation_April_2014.pdf.

letters from professional and trade bodies to the then Secretary of State for Justice and the Prime Minister, and was referred to in Parliamentary debates as well as being the subject of an Early Day Motion which attracted 69 signatures from members of parliament.[8] The Walton Report recognised a developing third party funding market but considered the introduction of the Jackson Reforms to insolvency litigation would lead to a significant reduction in the funds brought into insolvent estates by litigation.

The concerns raised by professional and trade bodies were recognised by many Parliamentarians and ultimately in February 2015 the Government announced the continuation of the insolvency carve-out with a further Government announcement promised by the end of 2015. Without providing any explanation for the reasons behind its decision, the Government announced in December 2015 that the carve-out would come to an end in April 2016.

This is the background to this report. In order to inform an accurate assessment of the likely effects of Governmental policy, R3 (with the support of ACCA, ICAEW, ICAS, ILA, IPA, JLT Specialty Ltd, IRS and Willis Towers Watson) has requested that I produce an update ('the Update') on the current insolvency landscape to my previous research (the Walton Report).

This Update should be read in light of the Walton Report as it is not intended to repeat the material found there in relation to the history and nature of insolvency litigation. This Update concentrates on legal changes or developments made since the beginning of 2014 and attempts to update the empirical evidence. Commentary is based upon new evidence gathered quantitatively as well as evidence gathered qualitatively from interviewing a number of practitioners.[9]

The following will be considered:

2 Empirical Update on insolvency litigation including:

2.1 Analysis of Sanctions Requests using CFAs made to the Secretary State in 2014 in relation to Compulsory Liquidations

2.2 Analysis of data produced from a survey of R3 members in December 2015 (including the use of CFAs, third party funders and damages based agreements)

2.3 Analysis of data provided by Manolete Partners plc

3 Statutory Changes with an impact upon insolvency litigation[10]

4 Sir Rupert Jackson's Mustill Lecture[11]

5 Lessons From 'Down Under' – Other Options based upon the Australian system

8 See http://www.parliament.uk/edm/2014-15/673.

9 I would like to express my deeply felt thanks to Victoria Jonson, Georgina Waite and Nick Cosgrove at R3 and the members of the 'Jackson' Research Committee for their advice and assistance throughout the Project.

10 Although there have been some relevant case law developments, in light of the Government announcing the end of the insolvency carve-out, they will not be discussed in this Update. Cases of interest would include *Lawrence v Fen Tigers Ltd (No. 3)* [2015] UKSC 50; [2015] 1 WLR 3485 which considered the recoverability regime was not a breach of the European Convention on Human Rights, *Re Hartmann Capital (in special administration)* [2015] EWHC 1514 (Ch) which decided that companies subject to special administration where the appointment was not made under Part II of the Insolvency Act 1986 did not fall within the terms of the insolvency carve-out and *Stevensdrake Ltd v Hunt* [2015] EWHC 1527 (Ch) which emphasises that the role of insolvency practitioner is a personal one and that practitioners may incur significant personal liability under the terms of a CFA whilst acting in an ostensibly successful manner on behalf of others such as the company's creditors.

11 2015 Mustill Lecture entitled *The Civil Justice Reforms and Whether Insolvency Litigation Should be Exempt* delivered by Jackson LJ on 16 October 2015 ('Mustill Lecture') and found at: https://www.judiciary.gov.uk/wp-content/uploads/2015/10/mustill-jackson-lj.pdf.

2 Empirical Update on Insolvency Litigation

The Walton Report relied upon two main datasets of empirical evidence. The first was an analysis of data held by the Insolvency Service in relation to 2010 which evidenced the likely amount of litigation being conducted with the use of CFAs by compulsory liquidators and trustees in bankruptcy. The Insolvency Service was required, until May 2015, to provide sanction or permission to such insolvency practitioners ('IPs'), ***inter alia***, to bring litigation on behalf of the estate (in the absence of such permission being provided by a creditors' committee). The analysis of the 2010 data suggested that IPs were pursuing claims backed by CFAs which were valued at approximately £300m. The second dataset involved the results of a survey of the membership of R3 carried out in 2013 and suggested that CFA-backed litigation brought into insolvent estates between £150-160m per annum.

This Update looks to repeat some of the previous work by considering a more recent dataset held by the Insolvency Service (in relation only to compulsory liquidations and not bankruptcies) and to analyse the results of a more recent R3 membership survey carried out in December 2015.

2.1 Analysis of Sanctions Requests using CFAs made to the Secretary of State in 2014 in relation to Compulsory Liquidations

Summary

The data held by the Insolvency Service shows a remarkable increase in the number of CFA-supported actions being brought by compulsory liquidators from 2010 to 2014 (up from 96 to 133) and a similarly remarkable increase in the value of such claims (up from £61,000,000 to over £250,000,000). Once extrapolated to provide a likely figure for all CFA-backed insolvency litigation, it seems claims to the value of at least '£1bn were pursued in 2014 (up from £300,000,000 in 2010).

The activity is fairly widespread amongst the insolvency and legal profession. It has become increasingly common for IPs to bring actions using a CFA, typically in cases where the estate has been left impecunious by its former controllers.

The issue as to whether recoverability of the CFA uplift and ATE insurance premiums should have remained was essentially an issue for the Ministry of Justice to balance fairness to defendants on the one hand with the public interest on the other. Sir Rupert Jackson commented in late 2015[12] that recoverability creates an unfair playing field for the litigants involved. Many IPs are of the view that the playing field is made uneven by the controllers of a company leaving it penniless due to their culpable actions.

12 See below section 4 at p30

As highlighted by the Walton Report, the abolition of the insolvency carve-out is likely to have two main effects:

1) cases involving claims for relatively small amounts are far less likely to be pursued. Any damages awarded will need to meet the legal team's base costs, its CFA uplift and the cost of ATE insurance. The data below shows that almost a quarter of claims are for amounts less than £100,000 and nearly a half for claims up to £250,000. As full recovery is itself fairly rare in insolvency litigation generally, such claims are likely to be seen as unattractive to IPs and their legal teams.

2) Even where actions continue to be taken using CFAs and ATE insurance, the loss of recoverability will lead to significantly decreased funds available for distribution to creditors as CFA uplifts and ATE insurance premiums will need to be paid out of any damages awarded.

2.1A Introduction to the Insolvency Service Data

For the calendar year 2014 there were 133 sanctions requests[13] made to the Secretary of State for consent to commence litigation supported by a conditional fee agreement ('CFA'). This figure is higher than the 96 in 2010.[14] It is noteworthy that the total number of compulsory liquidations in 2014 was significantly down on that in 2010 (3,738 as opposed to 4,792)[15]. These figures suggest that during a period when there was a 22% reduction in total numbers of compulsory liquidations, the same period saw an increase of 39% in CFA-backed litigation.

Although the total number of sanctions request entries recorded by the Insolvency Service for 2014 suggests a reasonably high number of requests being made each year, this ignores the fact that much of the correspondence recorded involves a mixture of repeat correspondence (due to initial rejections or requests for further information), applications made in error (as the companies were in voluntary not compulsory liquidation), applications requesting sanction to compromise creditor claims or to pay creditors in full and many applications being merely requests for slight amendments to existing sanctions.

There were, of course, a number of sanction applications made in relation to proposed litigation which did not involve the use of CFAs but it was apparent that approximately 85% of new applications to sanction litigation did involve CFAs. The minority of cases where litigation was proposed without using a CFA often involved estates where there were some assets available to fund litigation.[16] There were a small number of cases where a third party funder was financing the action without using a CFA[17] (some cases funded by third parties still utilised CFAs), another small minority involved an existing creditor (such as HMRC) financing the action, some cases were being brought overseas and were therefore subject to the domestic rules of those countries in terms of

13 Anonymised versions of each request are replicated in the table in Appendix A. The author is most grateful to the Insolvency Service, and in particular to Roger Gardner and his team, for permitting access to data held by it in relation to sanctions requests.

14 For details of the data from 2010 see Walton *The Likely Effect of the Jackson Reforms on Insolvency Litigation – an Empirical Investigation* April 2014 ('the Walton Report') p 17 et seq.

15 See the tables available from the Insolvency Service statistics available at: https://www.gov.uk/government/statistics/insolvency-statistics-october-to-december-2014.

16 One typical example involved a claim for £800,000, the costs of which were estimated to be £10,000 where the balance on the estate was £150,000. Another involved an estate balance of £71,000 with a claim value of £15,000 where the likely costs of the action were only £5,000.

17 Some of these cases were for significant amounts, for example one case involved various claims under ss.212, 238, 423 Insolvency Act 1986 and in relation to illegal payments of dividends in breach of s830 Companies Act 2006 where the total value of the claims was over £5,000,000.

litigation funding and another small minority of cases not using a CFA were in estates where the claim was so small as not to warrant such funding arrangements (for example, claims of around the £2,000 value).

It is striking how more prevalent the use of CFAs appears to have become by 2014 when compared with 2010 where it was estimated that CFAs were being used in only approximately 25% of cases.[18] It is not clear what has led to this increase in use of CFAs. It may be that the publicity surrounding the insolvency carve-out announced in 2013 actually increased awareness within the insolvency profession as to the utility of CFA-backed litigation or it may just be that the incidence of a larger proportion of no-asset estates has increased, thus necessitating the increased use of CFAs.

2.1B Value of Claims

The 2014 data shows the total value of claims being pursued was £250,283,580.[19] The total value of claims which were the subject of sanctions requests in compulsory liquidations in 2010 was £61,005,787.[20] The value of the equivalent sanctions requests in 2014 is over four times that amount.

The 2014 total is based upon the 129 cases where a figure was provided by the applicant IP. The highest claim was for £57,000,000 and the lowest for £2,592. The mean average figure was £1,940,183 whilst the median figure was £293,178. Although there were a number of very valuable claims being pursued, 30 claims (23%) were for less than £100,000 with 60 (46%) for £250,000 or less. The breakdown of claims can be seen in Table 1 below.

If one accepts that the incidence and nature of insolvency litigation is likely to be very similar in compulsory liquidation as it is in voluntary liquidation, it is possible to extrapolate a likely total figure for CFA-backed litigation pursued in all liquidations in 2014. According to Insolvency Service statistics[21] there were 3,738 compulsory liquidations in 2014 whilst there were 10,302 creditors' voluntary liquidations (CVLs) – approximately 2.76 as many CVLs as compulsories. If the total value of compulsory liquidation CFA-backed claims is multiplied by 2.76 the resulting figure of £690,782,681 is the likely equivalent figure for CVLs. If these figures are added together the final figure for the likely value of CFA-backed litigation in all liquidations for 2014 is £941,066,261.

This figure takes no account of CFA-backed litigation in bankruptcies (which in 2010 was estimated to be nearly £59m and is unlikely to be less than that in 2014 as the liquidation cases suggest a general increase rather than a decrease in CFA-backed litigation). There will also be a significant number of CFA-backed claims in administrations and some further claims in compulsory liquidations where the sanction of the liquidation committee was acquired. It is inconceivable that the total of these additional claims would be less than £59m and so it is very likely that the total claims for CFA-backed insolvency litigation in 2014 would be over £1bn.

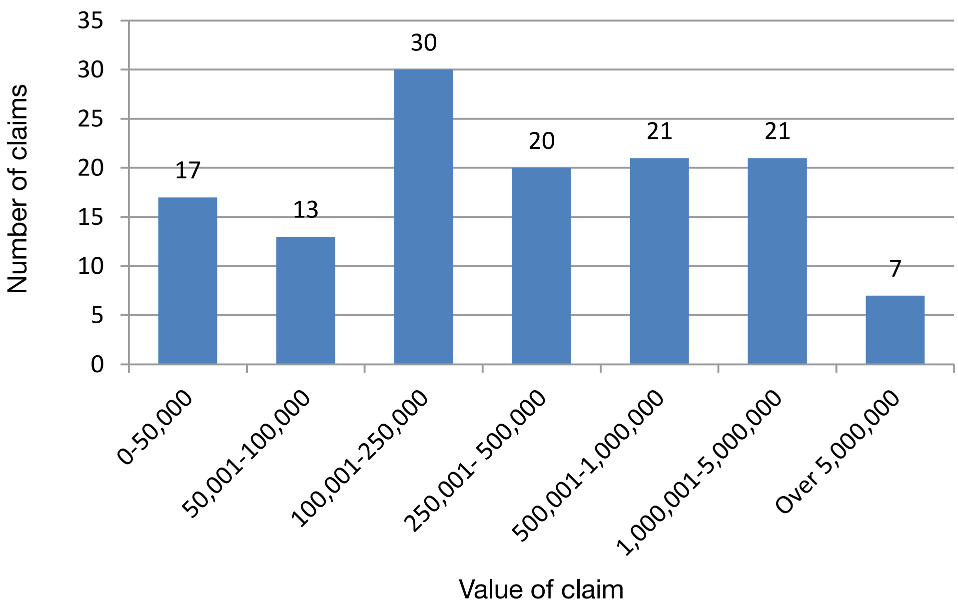
18 Walton Report at p 17.
19 In order to reach this total figure some figures presented in the sanctions requests required some adjustment. For example, where a claim was quantified in an overseas currency, it was converted into sterling. Where a spread of figures was suggested, the figure recorded was a median figure falling in the middle of the spread.
20 See the Walton Report at p 21.
21 See the tables available from the Insolvency Service statistics available at: https://www.gov.uk/government/statistics/insolvency-statistics-october-to-december-2014.

As 24% of such debt is likely to relate to monies owed to HMRC,[22] it would seem likely that at least £240,000,000 of the claims being pursued would relate to money owed to HMRC.

The estimate for CFA-backed litigation in insolvencies of over £1bn may be compared with the equivalent estimated total figure for 2010 of £300m identified in the Walton Report.

The incidence of CFA-backed insolvency litigation has increased significantly in three years.

Table 1: Value of Claims



2.1C Value of Insolvent Estate

In relation to the cases involving a CFA, the value of the insolvent estate varied from between £329,808 at the highest to a debit balance of £25,009 as the lowest. The mean average estate value was £5,217 with the median being a debit balance of £598. If one ignores the relatively small number of relatively high value cases (18 cases involved estates with a balance of £10,000 or more) and the one case with a significant debit balance (the £25,009 mentioned above) being carried by the IP, 113 cases (out of the 132 where a value was provided) showed a range between a credit balance of £6,500 and a debit balance of £3,356. A very large majority of cases (approximately 86%) therefore concerned companies which had been left with very few, if any, assets which could be used to fund litigation.

2.1D Base Legal Costs

The base costs of solicitors (and counsel), prior to any uplift, showed a variation between the highest of £3,360,817 and the lowest of £650.[23] The mean average was £133,575 with the median figure being £40,000.

22 According to the Office of Fair Trading approximately 24% of all unsecured debt in liquidations is owed to HMRC: see *The market for corporate insolvency practitioners: a market study* OFT1245 at footnote 6.

23 No figure was provided in 5 cases.

2.1E Likelihood of Success

The estimated likely success of the proposed action was expressed as a percentage in 59 cases but was described in the form of a brief narrative in 68 cases. No assessment of likely success was provided in 6 cases. Tables 2 and 3 show the breakdown of the two categories of case separately. The cases which provided a percentage show a bunching around the 60-75% mark whilst the narrative cases show a very large majority of actions being taken where the chance of success was rated as "Good". It would appear that an assessment of likely success as being "Good" would include the percentage range of between 60 and 75%.

Table 2: % Likely Success

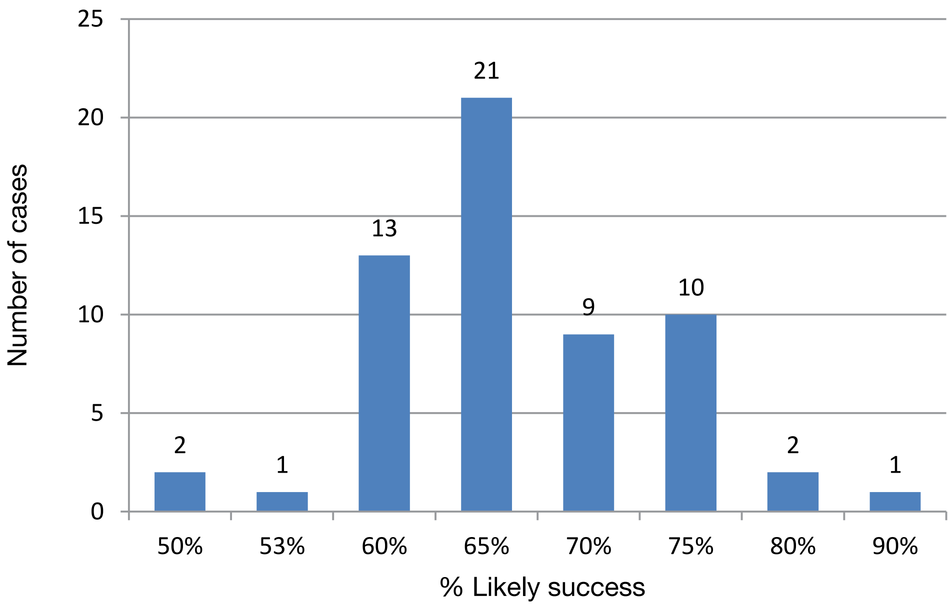
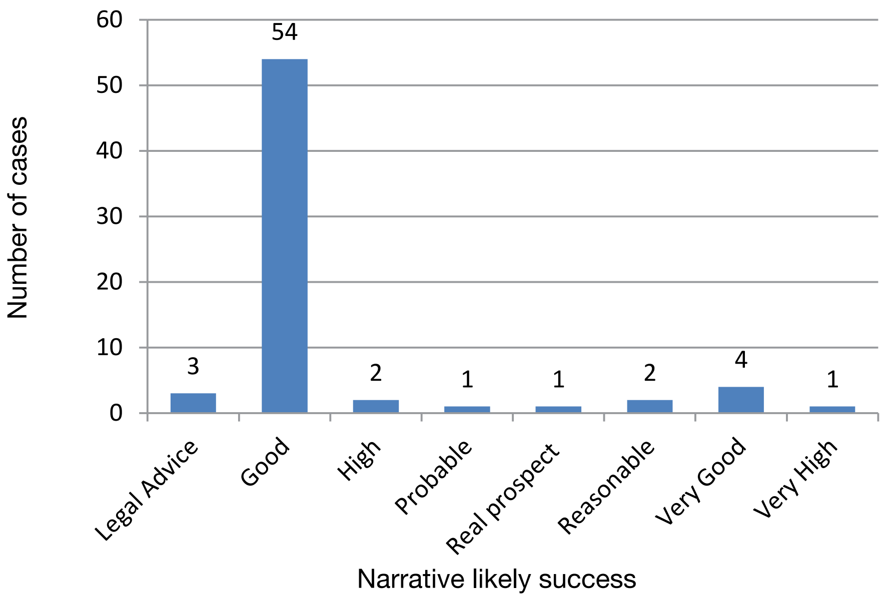


Table 3: Narrative Likely Success



2.1F Uplift Percentage

The spread of the percentage uplift on the base costs under the terms of the proposed CFA ranged from 0% to 100%. The mean average of the 128 cases where a percentage was provided, was 76.3%.[24] The mean average base legal costs was £133,575 (see 2.1D) and 76.3% of that figure is £101,918. It is this figure which in addition to the cost of any ATE insurance premium which will no longer be recoverable from a losing defendant once the insolvency carve-out comes to an end.

If one considers only those cases where the claim is for less than £100,000, the effect of the loss of the insolvency exemption can be seen clearly. Of those claims (where complete data was recorded), the mean average value of the claim was £44,305.60. The mean average figure for base legal costs was £16,752.08 with an average uplift of 64.6% (equating to an average monetary value of £10,821.84). Once the uplift is added to base legal costs, the total comes to £27,573.92. This calculation does not include a likely ATE insurance premium nor the cost of the IP's time. It is unlikely that the average surplus of £16,731.68 would cover these additional costs, let alone permit a dividend to unsecured creditors.

A similar calculation may be made involving all the cases (again where the records are complete) where the claim is for up to £250,000 (46% of the total claims supported by a CFA). The mean average figure for a claim is £102,573.40. Average base legal costs are £28,798.96 with an average CFA uplift of 65.29% (a monetary average of £18,802.84). The total legal costs will therefore be £47,601.80 which is a little less than half of the value of the claim. This is a more promising result but again assumes a full recovery is made and does not account for the IP's time nor the cost of ATE insurance.

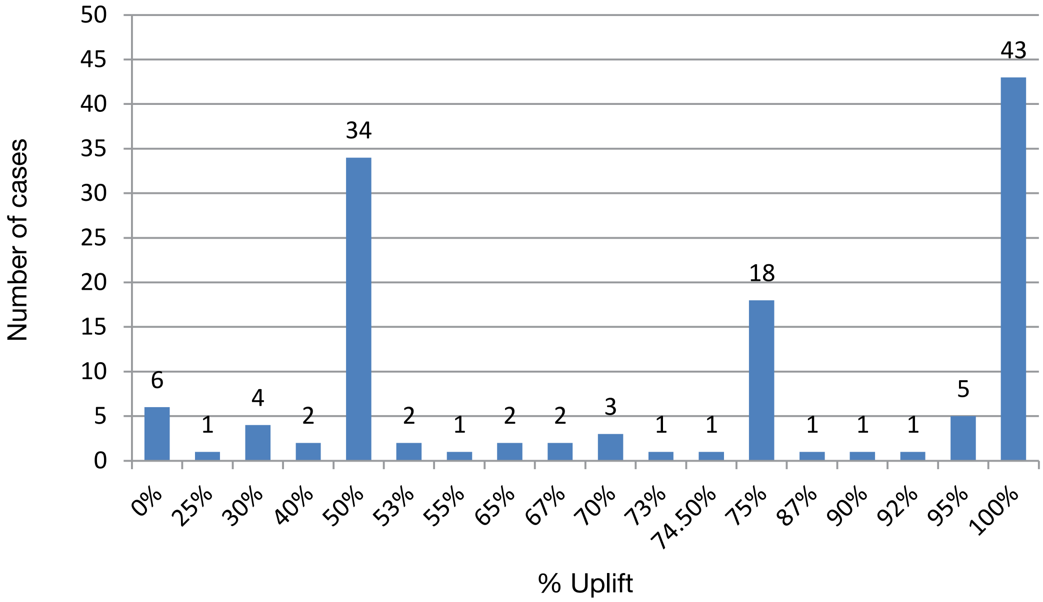
These two sets of calculations assume that a full recovery is made on the claim but in reality the average recovery appears likely to be only about 50% of the value claimed (see the data in 2.2). It is easy to see why IPs state that claims at the lower end of the market (certainly for those valued at less than £100,000) will not be economically viable to pursue using a CFA once the insolvency exemption comes to an end. Even when pursuing claims up to £250,000, assuming a recovery of approximately 50% is made, the claim becomes a significant risk for the IP as little, if any, value is likely to find its way to the estate to pay the IP's fees or to make a dividend to unsecured creditors. This suggests about half of claims currently pursued using a CFA (the 46% of claims up to a value of £250,000) may not be pursued, at least not using a CFA, once the insolvency exemption comes to an end.

Table 4 shows the spread of uplifts. It shows that the most popular % uplifts are 50%, 75% and 100%. Although rare, there were a number of cases where the terms of a CFA agreement explicitly limited any return to the legal team to no more than a percentage of overall recoveries (typically 20%). This appears to be a hybrid form of damages based agreement and may form the basis for CFA agreements in the future following the loss of the insolvency carve-out.

24 In a number of cases, a sliding scale for the uplift was provided which increased as a case progressed. For the purposes of calculation, a mean average figure based upon the sliding scale has been attributed to such cases.

The Walton Report identified the seeming lack of consistency in how uplift percentages were arrived at and recommended that the profession receive guidance on how to decide appropriate uplifts.[25] In light of the insolvency carve-out coming to an end, it may be necessary for IPs to think more carefully about what percentage uplift they agree. As the uplift will no longer be payable by a losing defendant, it will need to be paid out of funds which would otherwise be available (generally) to unsecured creditors. IPs' decisions on uplift percentages will come under greater scrutiny from creditors.

Table 4: % Uplift



2.1G ATE Insurance

Out of the 133 CFA-backed sanctions requests, 115 explained how, if at all, potential liability for adverse costs would be covered. In 79 cases, the IP intended to take out After The Event ('ATE') insurance, whilst in an additional 9 cases, the IP explained that ATE would be taken out if it proved necessary (which appears to refer to cases where the IP expected no defence to be put in, but if one were entered, ATE insurance would be taken out then). ATE was not to be taken out in 23 cases where the risk of the litigation would be covered by the estate or the IP firm itself. In 4 cases, adverse costs were to be covered by a creditor indemnity or by a third party funder. The dataset from 2010 is not entirely comparable to the 2014 data as it included a large number of bankruptcy cases involving possession and sale of a bankrupt's home where the risk of adverse costs was low. It would appear that the proportion of cases where ATE insurance is taken out by IPs has remained broadly the same from 2010 to 2014.

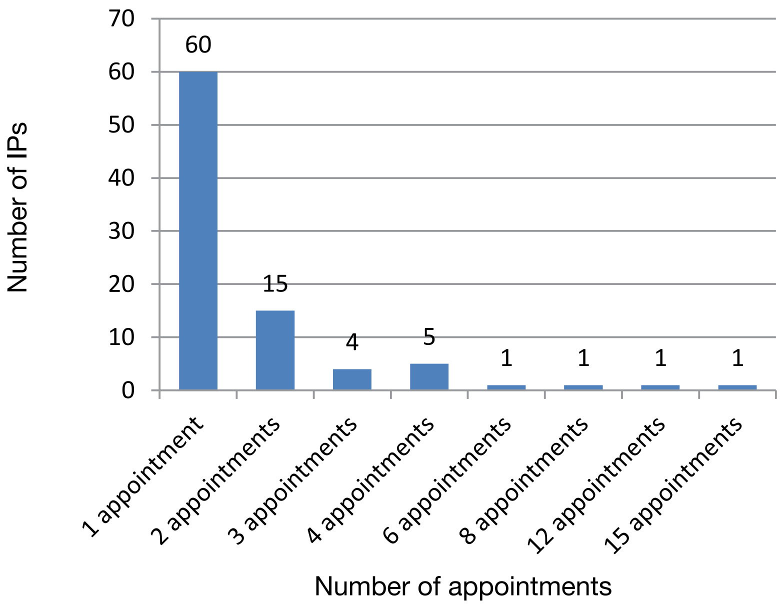
The data held by the Insolvency Service does not record the cost of ATE insurance.

25 Walton Report pp 24 and 25 and Part 10 Conclusions.

2.1H Numbers of Appointments Taken by IPs

Table 5 shows a breakdown of the numbers of appointments taken by IPs who were engaging in CFA-backed litigation. In total there were 88 different appointment-taking IPs (although there were 31 joint appointments). Most IPs (60) were involved in only one appointment but at the top end there was one IP with 12 and another with 15 appointments.

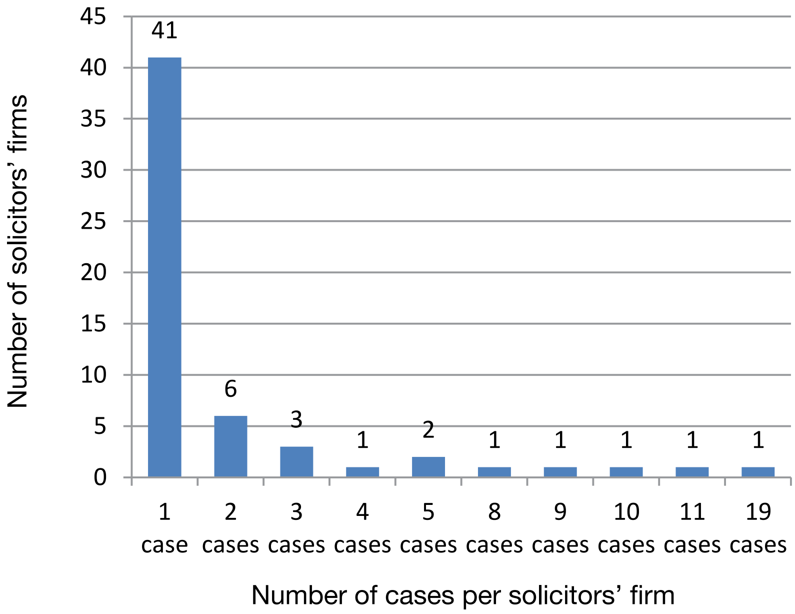
Table 5: Number of Appointments per IP



2.1I Number of cases per Solicitors' Firm

Table 6 shows the breakdown of solicitors' firms being used in the CFA-back litigation. There are a small number firms who appear to do a deal of such work with one firm being instructed in 19 cases with four other firms having instructions in between 8-11 cases. It is clear that a reasonable number of firms do the occasional piece of CFA-backed insolvency litigation as the data shows 41 firms who were only instructed in one case. In total there were 58 different solicitors' firms conducting CFA-backed insolvency litigation.

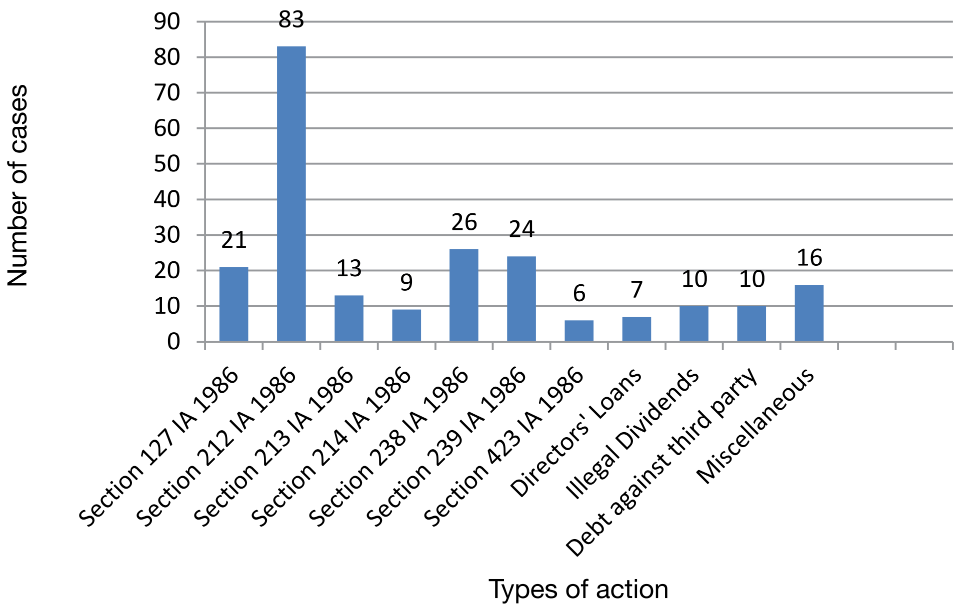
Table 6: Number of cases per solicitors firm



2.1J Types of Action

Most of the actions being brought relate to the IP taking action against former participators in the respective companies. Many of the actions are composite actions with more than one cause of action. The most common allegation is based upon breach of directors' duties under s212 Insolvency Act 1986 and such actions are often combined with actions attacking preferences under s239 Insolvency Act 1986, transactions at an undervalue under s238 Insolvency Act 1986 or for the return of illegal dividends (under s847 Companies Act 2006) or unpaid (and often unauthorised) directors' loans. The total number of causes of action is over 200 as many of the cases being brought involve more than one cause of action. A reasonable minority of actions are brought not against parties connected to the company but against outsiders, for example, debt actions based upon non-payment of contractually due consideration or rent, or actions for professional negligence. The breakdown of the actions is shown in Table 7. The Miscellaneous category includes, *inter alia*, professional negligence (2 cases), actions brought under s15 Company Directors Disqualification Act 1986 (2 cases), s216 Insolvency Act 1986 ('IA 1986') (2 cases), s320 Companies Act 1985 the predecessor to the current s190 Companies Act 2006 (2 cases) and actions based upon Missing Trader Intra-Community fraud (3 cases).

Table 7: Types of Action



2.2 Analysis of data produced from a survey of R3 members in December 2015 (including the use of CFAs, third party funders and damages based agreements)

Summary

Although the figures discussed below are likely to be conservative for the reasons mentioned, the amount of value brought into insolvency estates in the previous twelve month period by CFA-backed litigation seems certain to be in excess of £500,000,000. Of this figure it appears likely that £120,000,000 is money owed to HMRC.[26] The amount of value being brought into estates by litigation supported by third party funders appears to be at least £50,000,000. Damages Based Agreements continue to be a rarity.

Whether a CFA is entered and/or the support of a funder is secured, the legal team and funder will typically require a similar likelihood of percentage success before taking on a case (a mean average of 65-66%).

The evidence considered in the Walton Report suggested that about one half of the value of actions brought using a CFA was eventually brought into the estate. The overall likely figure (taken from the Insolvency Service data considered above) was that approximately £1bn of claims were pursued in 2014. The data from the R3 survey suggests at least £500,000,000 was brought into insolvent estates using CFAs in the previous 12 months. These findings are broadly consistent with the proportions suggested by the Walton Report based upon previous data that approximately half of the monetary value of claims chased using a CFA are eventually realised.

26 This calculation again relies upon the Office of Fair Trading finding that approximately 24% of all unsecured debt in liquidations is owed to HMRC: see *The market for corporate insolvency practitioners: a market study* OFT1245 at footnote 6.

Although third party funders are sometimes criticised for taking on only large cases, the R3 survey shows the mean average of value brought back into insolvent estates by CFA-backed litigation is £2,197,335 per appointment taker whilst the equivalent for third party funded cases is £816,635 per appointment taker. There may be a number of variables at work here as a relatively small number of large cases are likely to increase the mean average in both categories. In addition, each appointment taker took on average 6.81 cases where litigation was supported by a CFA (with the corresponding mean average of 1.52 cases per appointment taker using a third party funder). The Insolvency Service data considered in the previous section suggests that nearly half of CFA-backed cases (46%) are for amounts of £250,000 or less. Such cases appear to bring in ultimately approximately half of that figure.

The data in the next section which looks at the case load of a specific third party funder suggests that over 60% of funded cases bring in total income of £100,000 or less.

It would therefore appear that a large proportion of all insolvency litigation (approximately half of cases) brings in a total figure of around the £100,000 value, whether backed by CFAs or third party funders.

2.2A Introduction R3 Membership Survey Data

The December 2015 R3 membership survey asked a number of questions on different aspects of insolvency litigation funding. The survey was answered by 337 members in total, with 183 responses from or on behalf of appointment takers. In terms of quantifying the amount and value of litigation (and how it was funded) only answers from or on behalf of appointment takers have been considered in order to avoid double counting (although this is still a potential risk due to joint appointments). The survey asked for data and views based upon the previous 12 months' case load. The anonymised results are presented in Appendix B but the main findings are discussed below in this section.

2.2B Quantity and Value of CFA-backed Insolvency Litigation

Based upon the answers of 178 appointment takers, a total of 920 cases supported by CFAs were undertaken in the previous 12 months. The mean average number of cases was 6.81 per appointment taker with the median average being 2.

A question enquiring as to how many of these cases would have gone ahead without the insolvency exemption to the Jackson Reforms was answered by 131 respondents. Over half of this number stated that none of the cases would have gone ahead without the exemption.

Of those who had undertaken CFA-backed litigation in the previous 12 months, only 14% (18 out of the 129 who answered this question) responded that they had had a case rejected by their legal team for the use of a CFA. The mean average of cases rejected was 1.83 cases per appointment taker who answered this question providing a total of 33 cases which had been rejected by legal teams.

In answer to a question asking for the total amount brought into insolvent estates by way of CFA-backed litigation in the previous 12 months, 155 respondents answered with 90 providing a figure. The total brought in was £193,365,474 with a mean value of £2,197,335 per appointment taker. The median average per appointment taker was £242,500 which suggests that the mean average figure is increased significantly by a small number of large cases or by a number of appointment takers with multiple cases. The total annual figure is likely to be conservative as 22 appointment takers stated that they did not know the value brought in during the previous 12 months (with 43 stating that no money had been brought in by such action). The likely total number of appointment takers nationwide is approximately 450, and so, with the total number of appointment-taking respondents being 183, the response rate from all appointment takers is approximately 40%. That being the case the likely total amount brought into insolvent estates by use of CFA-backed litigation is likely to be 2 ½ times the total figure provided by the survey which would be £483,413,685 realised from approximately 2,300 cases. As 22 appointment takers were unable to quantify the value brought into insolvent estates by CFA-backed litigation it is reasonable to assume this total figure is likely to be less than the actual figure brought in. The real figure is likely to be over £500,000,000.

2.2C How CFAs operate in practice

A question enquiring as to the average percentage likelihood of success required by legal teams was answered by 154 respondents. The mean average percentage success rate was 64% with the median average being 65%.

Respondents who had either never used a CFA or had not used a CFA in the previous 12 months were asked for the reasons why this was the case. Although only 44 respondents in total answered this question, the most popular answers were that the IPs had not come across a case where the use of a CFA would be appropriate, cases were too uncertain or the amount of money was too low to warrant action.

2.2D Quantity and Value of Insolvency Litigation supported by Third Party Funders

Of the 165 appointment takers who answered, almost half stated that they had, at some time, used third party funders, with 42 stating that they had used a funder in the previous 12 months. Just over a half (52%) had never used a third party funder. The total number of cases pursued with the assistance of a funder was 64. The mean average number of cases pursued using a funder per appointment taker was 1.52. As the sample of appointment takers constitutes approximately 40% of all appointment takers, it is again possible to extrapolate these figures by multiplying by 2½. This calculation suggests that a likely total of 105 appointment takers have used a funder in the previous 12 months bringing approximately 160 cases with the assistance of such funders.

Although a small number of respondents were unwilling to divulge the identity of the funder whom they used, most were willing to do so. In total 17 different third party funders were identified with one dominant funder supporting 22 appointment takers, with one funder supporting 3 appointment takers, two funders supporting 2 appointment takers and the remainder supporting 1 appointment taker.[27]

The total amount brought back into insolvent estates in the previous 12 months by using third party funders was answered by 80 appointment takers with only 23 providing an actual figure. The total amount stated to be brought into insolvent estates was £17,965,966 with a mean average figure of £816,635 per appointment taker. The median average figure was £175,000 per appointment taker, which, similarly to the figures for actions supported by CFAs considered above, suggests that the

27 According to the survey results Manolete supported 22 appointment takers, Orchard 3, Annecto and Burford 2 each and the following supported one appointment taker: Atlanta, Augusta, Cavendish, DAS, Delta, JLT, Judge, Maxima, Metalope, SHAD Recovery, Templeton, Therium and Vannin.

mean average figure is increased significantly by a small number of large value cases. If the annual figure is extrapolated in the same way as the figure for CFA-backed litigation the final likely figure for value brought into an estate with the support of a funder is approximately £45,000,000. This figure is again likely to be conservative as 17 respondents stated that they did not know how much value had been brought in (with 40 stating that no value had been brought in). Due to the large number of "Don't Knows", the actual figure is likely to be in excess of £50,000,000 and may be considerably more than that.

2.2E How Third Party Funders operate in practice

In total 120 respondents, who had either never used a third party funder or who had not used one in the previous 12 months, provided reasons why they had not used a funder. The most popular reason given was because the appointment taker used CFAs instead. The second most popular reason given was that cases were too uncertain to be attractive to a funder which was closely followed in third place by the view that a higher return was likely without the use of a funder. About a third of respondents also stated that the amount of money was too low for a funder to be interested.

When asked why they used a funder, 77 respondents gave reasons. Over half of the respondents stated that they did not wish to risk their own firm's profitability and sustainability by bringing significant litigation. Over 40% cited that their own firm lacked capacity in terms of either expertise or funding to pursue the case. Nearly 20% were attracted by the fact that the cost of the appointment taker's work-in-progress would be covered by the funder. A number of other individual views were expressed, with most being related to a lack of funds in the estate or the related problem of the likely legal and other costs being too significant for the legal team to risk carrying under the terms of a CFA.

Approximately one quarter (24.7% of the 77 who answered this question) of appointment takers, who had previously used a funder, had had a case rejected by a third party funder in the previous 12 months. The mean average of cases rejected by those who had suffered a rejection was 1.47 cases. Over 70% (54 of the 77) had not suffered a rejection.

The likelihood percentage of success required by a funder averaged out at 66% (based upon 42 substantive answers).

2.2F General Issues

A number of questions were put to all the R3 membership (both those who took appointments and those who did not, for example, solicitors and barristers). In answer to a question asking about how their practice would change in the event that the insolvency carve-out comes to an end, 63% of the 281 respondents stated that they would reduce the number of cases taken on where there were few or no assets. Over half (54%) would seek to use third party funders and almost half (49%) would stop or decrease the amount of litigation work currently carried out. About a fifth (22%) would carry on as before using CFAs and about the same proportion (21%) would seek to use Damages Based Agreements. Although still very rare, 16 respondents had undertaken a total of 30 Damages Based Agreements in the previous 12 months. Approximately 90% of respondents had never used a Damages Based Agreement.

The uncertainty surrounding the future of the insolvency exemption has led to 17% of respondents taking on fewer cases and 38% of respondents have seen an increase in the cost of ATE insurance premiums.

An overwhelming majority of 86% (239 of 277) stated that the loss of the insolvency carve-out will result in less money for creditors.

2.3 Analysis of data provided by Manolete Partners plc

2.3A The Developing Market

It would appear that there are at least 17 funders who actively fund insolvency cases in the UK although most of these operate at the top end of the market where only large cases are considered. There appear to be between three and four funders who will take on smaller cases.[28] This is all a bit different to a couple of years ago when the Walton Report was compiled. As the market is rather better known now than before it suggests the market is, or has become, significantly larger. Although there are a number of large Third Party Funders who operate in several jurisdictions and across different types of commercial causes of action, there is a developing market in funders who specialise in UK insolvency actions. The funder with the highest profile in the UK market, and based upon the R3 membership survey discussed in the previous section, with a majority of the market share, is Manolete Partners plc ('Manolete'). Manolete has kindly provided detailed data as to how its business operates with very clear information on all the cases in which it has been involved.

2.3B Manolete data

Manolete was approached due to it being the most frequently used funder by the insolvency profession. The data provided by Manolete shows that, over its six year lifetime, it has taken on the funding of 117 cases with a significant majority of its cases taken on in the last three years. Of this total, 87 have been completed with 30 still in progress. Seventy three of the 117 cases have an income value of £100,000 or less.

Manolete does not use CFAs to support its litigation but pays its legal team their normal fees. In total it has recovered £16.2m. Its total spend on lawyers to date has been £2m. The returns from these actions to insolvent estates total £7.6m. As Manolete pays its own legal fees and indemnifies the insolvent estate for any adverse costs, a funding arrangement does not involve any risk to the IP or the estate.

The data shows that Manolete has financed litigation involving 57 different IP firms.

Although there is a perception that funders such as Manolete "cherry pick" the best cases, the reality may be rather different. The data supplied by Manolete shows that over 90% of the cases which it takes on have previously been rejected by the IP's lawyers for pursuit using a CFA or an action supported by a CFA has failed to deliver a result. In the words of Steven Cooklin, Manolete's chief executive, the company has "very largely taken on 'orphan' and 'unloved' cases." Although

28 See e.g. http://www.insolvencylitigationfunding.com/insolvency-litigation and the answers to the R3 membership survey December 2015.

when Mr Cooklin was interviewed in the context of the Walton Report in 2013, only about 10% of approaches from IPs led to a funding agreement being entered, that proportion has increased in recent times to over 20%. This is partly due to IPs becoming more aware of the requirements of Manolete and is indicative of a continuing relationship with some IPs and legal teams.

One aspect of the cases taken on by Manolete is that the average time to complete a case (looking for these purposes only at the 87 completed cases) is 7.8 months from acceptance of the case.[29] There are no equivalent data for CFA-backed insolvency litigation.[30] A small proportion (16%) of the Manolete cases are brought to a conclusion relatively quickly where the action is abandoned which may be because a strong defence has been presented or the defendant is not financially capable of satisfying any future judgment.

In considering the 87 completed cases, it is interesting to note that 46 involved the purchase of "company actions" (which have always been capable of being assigned) whilst 41 involved funding of predominantly "office holder" actions which until recently were not capable of being assigned. It is apparent that due to the change brought about by s118 Small Business, Enterprise and Employment Act 2015, Manolete's preference in future will be to purchase both company and office holder actions.

29 This average time period does not take account of investigatory work which may have been carried out prior to the action being offered to Manolete nor actions which are continuing.

30 The cases listed in Appendix 3 of the Walton Report show that out of 96 compulsory liquidations which involved pursuit of a legal claim using a CFA, 71 of the liquidations were still ongoing between 2 and 3 years later. This does not mean necessarily that the litigation was still ongoing just because the liquidation had not been completed but in many of the ongoing liquidations it would seem likely that the litigation had not been finalised.

3 Statutory Changes with an impact upon insolvency litigation

3.1 Introduction

Insolvency law is subject to almost continuous change. Some of these amendments are merely tidying-up provisions but others are more significant and often effected due to policy considerations. The period since the Walton Report was published has witnessed a number of statutory changes which have the potential to impact upon insolvency litigation. This section considers the following statutory amendments:

- Changes to IPs' Fees Regime
- Power to Assign Office Holder Actions
- Abolition of Need for Sanction
- Disqualification Compensation Orders.

This section will consider each of these changes in turn and consider what effect each is likely to have on insolvency litigation in terms of removing money from culpable parties (usually company directors who have acted inappropriately) and returning it to creditors.

3.2 Changes to IPs' Fees Regime

It is trite law to state that an IP usually owes a duty to all creditors to maximise the assets in an insolvent estate. The use of CFA-backed litigation is clearly a significant weapon in the armoury of IPs in that, as explained in the Walton Report, the IP may bring litigation even where the estate is itself impecunious. A losing defendant may be ordered to pay the IP's legal costs, plus (until April 2016) the CFA uplift and the ATE insurance premium. It is rare that a losing defendant in insolvency litigation is able to pay a full damages award and all of the adverse costs of the litigation. It is very common for such actions to be settled with the consequence that the legal team, the ATE insurer and the IP all take less than their full entitlement. The 'hit' that they take on their fees is often a deliberate decision taken to ensure, wherever possible, that there is a dividend paid to the creditors.[31]

From 1st October 2015[32] there has been a general requirement for IPs, who wish to use the time cost basis for their remuneration, to provide a "fees estimate" prior to the basis of their remuneration being agreed. In such cases, the IP must, prior to the basis of remuneration being agreed, provide an estimate of the likely fees[33] to be incurred and an estimate of the cost of likely expenses which will be incurred.[34] The IP's remuneration can only exceed the fees estimate if the

31 This point is considered in the Walton Report particularly in Parts 6 and 8.
32 Insolvency (Amendment) Rules 2015 (SI 2015/443) para 1.
33 The term "fees estimate" is defined in a new Rule 13.13 (18A) introduced by SI 2015/443.
34 SI 2015/443 introducing for administration amendments to Rule 2.106, in liquidation amendments to Rule 4.127 and in bankruptcy amendments to Rule 6.138. Where the IP proposes to take a fixed fee or a fee based upon a percentage of value of assets realised or distributed, the IP must provide details of the work it is proposed will be undertaken and the anticipated cost of other expenses, prior to the basis for remuneration being agreed. If not otherwise agreed, the court may agree the IP's remuneration. For a recent assessment of an IP's claim for fees see *Re Brilliant Independent Media Specialists Ltd* [2015] BCC 113.

increase is approved (usually by the same creditors who will have initially agreed to the basis for remuneration).[35] The approval for payment of any increase in remuneration must be informed in that the IP must explain fully why the increase is needed.[36]

Although the new system of IP fees is designed to provide more creditor control over an IP's fees, it may not always have a positive effect. It is likely that an IP whose fees estimate has been approved by the creditors is likely to draw up to the limit of that fees estimate. It would be very difficult for a creditor to complain if an IP did so as the creditors will have previously approved the amount. The new system might therefore have the unintended effect of IPs being less willing to take a hit on their fees than they did previously.

The Jackson Report made virtually no reference to insolvency litigation but where it was mentioned there were some critical comments recorded based upon anecdotal evidence of IPs overcharging.[37] Empirical research recently carried out by the author (jointly with his colleague Chris Umfreville) analysed 500 administrations dating from 2010.[38] The evidence from that work showed that IPs were paid in full on average in 18.33% cases. The average fee drawn by IPs as a percentage of fees charged was 59.38%. Unsecured creditors received a dividend in 28.09% of cases. This evidence is drawn from cases decided before the new fees' regime was brought in. The new system should ensure more transparency as to how IPs are paid and how much they are paid. There is less mystery now about what is going on and more creditor control over IPs' fees. As suggested above, the new regime may encourage a lesser willingness for IPs to discount their chargeable fees if the fees estimate has been previously agreed with the likely consequence that there will be less money available for dividend to creditors.

Although the new fees regime is not intended to have any impact upon insolvency litigation, a number of IPs who were interviewed as part of this Update, did point out a number of possible and unintended side effects of the new regime. IPs whose fees have been approved on the normal time cost basis by the creditors are less likely to take on insolvency litigation where the outcome is uncertain (as it nearly always is) as any prolonged litigation would be likely to necessitate an increase in the fees estimate and a need to have that increase approved by the creditors.

Where the estate is impecunious, IPs whose fees estimate has previously been approved (again on the time cost basis), are more likely to settle litigation early, at perhaps a lesser figure than before. As legal costs (base costs and CFA uplifts) and other costs (including ATE premiums) increase as litigation continues, the knowledge that those increased costs will have to be met out of any final figure secured from the defendant, will potentially encourage early and lower settlements, especially if the IP's own fees estimate has been reached.

35 SI 2015/443 introducing new Rules 2.109AB and 2.109D (administration), 4.131AB and 4.131C (liquidation) and 6.142AB (bankruptcy). Any increase in the estimated IP fees or other expenses must be disclosed and explained to creditors. There is no requirement for approval of any increase in the other expenses incurred by the IP but any such increases must be disclosed and explained, in reports to creditors (see in administration the new Rule 2.47(dd), in liquidation the new Rule 4.49B (fa) and in bankruptcy the new Rule 6.78A(fa)).

36 Although it will usually be for the creditor constituency who first agreed to the basis for remuneration to agree to any increase on the fees estimate, the position in administration (and any subsequent liquidation) is slightly different to that in liquidation and bankruptcy. In administration, where the secured creditors (or the secured creditors and over 50% of preferential creditors) have agreed to the basis for remuneration, there is nothing in the Rules requiring their consent to any increase on the fees estimate. This takes account of the perceived wisdom that secured creditors, when they are unlikely to receive full payment, already exercise effective control on IP fees and expenses. In an administration where the secured creditors (or the secured creditors and over 50% of preferential creditors) initially agree to the basis of remuneration, if it subsequently becomes apparent that a distribution to unsecured creditors is possible (other than by virtue only of s 176A), any increase in fees may only be agreed, under the new Rules 2.109D and 4.131D, by the creditors in general (or the creditors' or liquidation committee as the case may be, if there is one).

37 *Review of Civil Litigation Costs: Final Report* TSO (December 2009) Chapter 28 at para 5.7.

38 Umfreville and Walton *Insolvency Practitioner Fees – an empirical investigation* Unpublished R3 Report May 2015.

A further possible consequence might be, in cases where the estate is impecunious, that an IP's fees are not agreed on the normal time cost basis but instead on the basis of a percentage of realisations. If the only value in the estate is a legal action, IPs might agree their fees to be a percentage of the eventual realisations. This basis for agreeing IP fees was discredited by the Cork Committee[39] and a return to it may not be seen as progressive.

3.3 Power to Assign Office Holder Actions

From 1st October 2015 it is now possible for administrators and liquidators to assign office holder actions such as those for fraudulent trading,[40] wrongful trading,[41] transactions at an undervalue[42] and preferences.[43] Section 246ZD[44] Insolvency Act 1986 contains this new power and makes the law on assignability of office holder actions consistent with the law on assignment of company actions (such as actions for breach of fiduciary duty or breach of contract)[45] which have been assignable since the nineteenth century.

The purpose of this change is to allow actions to be assigned in circumstances where IPs are unable or not inclined to take action themselves but where the action might still be attractive to a purchasing third party.

Although some third party funders have expressed a rather lukewarm reaction to this change, the leading third party funder who specialises only in insolvency litigation (Manolete) has welcomed the change and generally is keen to take an assignment of an action rather than act as funder in an action being brought by the IP.

It appears too early to assess how effective this change will be in encouraging more insolvency litigation but it appears to be a positive development especially in cases where the action being brought combines office holder actions (such as for transactions at an undervalue) with company actions (such those for breach of fiduciary duty). Previously, it would not have been possible to assign all the causes actions to a third party funder. The evidence provided by Manolete, and considered above in section 2.3, suggests an almost 50-50 split between actions which were previously funded (nearly always office holder actions) with actions which were assigned (company actions). This is likely to alter following the changes to allow assignability of office holder actions with virtually all actions in future being purchased rather than merely funded.

3.4 Abolition of Need for Sanction

Since 26th May 2015, liquidators (and trustees in bankruptcy) no longer require the sanction of the court or a creditors' committee (or where there was not such a committee, the Secretary of State or a meeting of the creditors in general) for the exercise of various powers, most notably in this context, the power to bring proceedings whether they be office holder or company actions.[46]

39 *Insolvency Law and Practice, Report of the Review Committee* 1982 Cmnd. 8558 at paras 883 et seq, especially para 889 where the system was criticised as seldom having "any connection with the actual work done in a specific administration."
40 Fraudulent trading actions under s213 Insolvency Act 1986 are from 1st October 2015 available to administrators, where the company is insolvent, as well as liquidators (see s.246ZA Insolvency Act 1986).
41 Wrongful trading actions under s214 Insolvency Act 1986 are from 1st October 2015 available to administrators, where the company is insolvent, as well as liquidators (see s.246ZB Insolvency Act 1986).
42 Under s238 Insolvency Act 1986.
43 Under s239 Insolvency Act 1986.
44 Introduced by s118 Small Business, Enterprise and Employment Act 2015.
45 See the comments by Jo Swinson MP, Under Secretary of State for Business, Innovation and Skills at Hansard 4 November 2014, Public Bill Committee in the House of Commons on Small Business, Enterprise and Employment Bill Session 2014-15, paras.447-448.
46 Section 120 Small Business, Enterprise and Employment Act 2015 abolished the need for liquidators to obtain sanction prior to exercising any power under Sch 4 Insolvency Act 1986. Section 121 abolished the need for trustees in bankruptcy to obtain sanction prior to exercising any power under Sch 5 Insolvency Act 1986.

The aim of this change is to allow liquidators the same freedom to take action as that enjoyed by administrators without the need to acquire sanction.[47]

It is not likely that the removal of the requirement to obtain sanction will have any significant impact on the incidence of insolvency litigation. It does remove a formality which would in many cases otherwise be required and so it will reduce slightly the cost of bringing litigation. One thing it does is to give complete freedom to liquidators to enter any agreement with their legal teams. Although not common, there were instances under the previous regime, where the sanction of the Secretary of State was needed, but where it was initially refused. An example of this can be found within the dataset held by the Insolvency Service and considered above (in section 2). In that particular case, it was the Secretary of State's opinion, based upon the views of the majority creditor, HMRC, that a 100% CFA uplift was unjustified. Only when the uplift was reduced to 75% was sanction granted.[48] This type of control or limitation is no longer possible.[49] Interestingly, a different case file held at the Insolvency Service suggested that the view of HMRC was that the amount of legal fees agreed (including any uplift) was a commercial decision for the IP and not a matter with which HMRC as a creditor would get involved.

3.5 Disqualification Compensation Orders

In relation to conduct after 1st October 2015,[50] a person disqualified as a director may also be made subject to a compensation order (or elect to offer a compensation undertaking) under s15A Company Directors Disqualification Act 1986.[51] The conduct relied upon by the Secretary of State in asking for a compensation order (or in deciding to accept a compensation undertaking) must relate to an insolvent company and must have caused loss to one or more creditors of the company. The compensation may be paid for the benefit of specific creditors, classes of creditors or to the company's assets generally. The compensation payable will be quantified by considering the amount of loss caused and the nature of the director's conduct.[52]

It will be some time before conduct carried out after 1st October 2015 becomes subject to disqualification proceedings where the Secretary of State also considers asking for compensation. Section 7(2) Company Directors Disqualification Act 1986 now allows the Secretary of State up to three years after a company has become insolvent to bring disqualification proceedings. The Secretary of State then has a further two years from the date of disqualification to apply for compensation. It will therefore be sometime before the compensation order regime makes any impact upon realisations for creditors.

It is not yet entirely clear how the Government envisages the compensation order regime operating. It is understood from the Insolvency Service that it anticipates applying for approximately 50 compensation orders or undertakings in the first year of its operation (which is likely to be at least two or three years away). It is not intended that the new regime will step on the toes of IPs who wish to take action against recalcitrant directors. Indeed in quantifying any compensation, account must be taken of any financial contribution already made in recompense for the conduct in question.[53] A different branch of Government, the Ministry of Justice, has explained that the compensation order regime "will make sure directors … who appear to have little wealth, pay a

47 See the Explanatory Notes to the 2015 Act at paras 716 – 718.
48 See Appendix A Case number 51.
49 A point seemingly overlooked by Sir Rupert Jackson in his Mustill Lecture 2015 at para 7.3.
50 See SI 2015/1689, Sch 1, Part 1, para 4.
51 Inserted by s110 Small Business, Enterprise and Employment Act 2015.
52 Section 15B Company Directors Disqualification Act 1986.
53 Section 15B(3)(c) Company Directors Disqualification Act 1986.

proportionate contribution in small cases (£5k-£15k) where taking formal legal proceedings would simply be uneconomic to bring."[54]

It may be that the Insolvency Service and the Ministry of Justice are saying the same thing here but in different terms. The reference to small cases within the £5,000 to £15,000 range appears to be directed at the quantum of the compensation being sought, rather than the total extent of the net liabilities of the insolvent company. If that is the case, it would appear that the compensation order regime is aimed at directors who have caused relatively small losses by their unfit conduct and who themselves are relatively impecunious. The comment that the new regime "will make sure" such directors pay, suggests that it will be commonplace, if not the default position, for the Insolvency Service, to apply for compensation in such cases. The full weight of the Government's legal enforcement resources will be aimed squarely at such individuals whilst not, it seems, at those who have caused significant losses or who appear to have significant personal wealth.

The potential impact upon insolvency litigation of the new compensation order regime is difficult to predict. IPs interviewed as part of this Update project were not optimistic that it would make a great deal of difference. There is a perception within the profession that the Insolvency Service has only a limited budget to pursue disqualification activity. One consequence of this, it is often said, is that most disqualifications pursued by the Insolvency Service target relatively "easy kills" not the "real bad eggs". If this type of defendant is pursued for compensation orders, as the Ministry of Justice suggests will be the case, the results may not be as beneficial as hoped. Compensation will only be paid by defendants who are capable of paying. If defendants towards the bottom of the scale are pursued, returns to creditors may be limited.

If the compensation order regime is used only against directors who are being pursued for between £5,000 and £15,000 its impact on insolvency litigation will be minimal. The Insolvency Service data considered at 2.1B above shows that in 2014 only three cases (out of a total of 129 where values were provided) were pursued by compulsory liquidators using a CFA where the value of the claim was for £15,000 or less.

Regardless of the type of defendant pursued for compensation by the Insolvency Service, one significant lesson from history is that directors became far less likely to defend disqualification proceedings when the Disqualification Undertaking regime came in under the Insolvency Act 2000. Prior to that the courts were "clogged up" with litigants in person defending disqualification proceedings. The Disqualification Undertaking regime introduced by the 2000 Act allowed directors to agree to disqualification without any costs implications. If the compensation regime is prosecuted with vigour, it is conceivable that directors will be far more likely to defend disqualification actions generally. The result might be a significant increase in disqualification hearings which will have costs implications for the Insolvency Service.

A further point made by some IPs who were interviewed was a concern that the costs of the Insolvency Service disqualification enforcement activities might be funded, at least in such cases, out of the proceeds of any compensation order and would therefore reduce or prevent any dividend to creditors who were impacted by the director's unfit conduct.

54 Letter from Lord Faulks QC, Minister of Justice, dated 26th January 2016, to a Labour Party MP.

4 Sir Rupert Jackson's Mustill Lecture[55]

In October 2015 Sir Rupert Jackson gave the 2015 Mustill Lecture[56] specifically on whether the insolvency carve-out should remain. Much of what Sir Rupert says is perfectly reasonable but is really aimed at civil litigation generally or refers to an insolvency world which no longer exists.

Sir Rupert argued that there were four reasons why the exemption should be brought to an end. It would appear that the Ministry of Justice has been greatly influenced by Sir Rupert's arguments in deciding to end the exemption.[57] Although Sir Rupert does not appear to have said a great deal which was new or different from his 2010 report, his four points are considered here.

Point One emphasised that the recoverability regime was intended to operate for the benefit of individual claimants of modest means not for the purposes of insolvency litigation. This is of course true but fails to consider the public interest argument in ensuring insolvency litigation is carried out effectively, especially in cases where the insolvent estate has no money with which to litigate. A great deal of insolvency litigation is brought against the individuals whose culpable actions have left estates penniless. Insolvency litigation is representative litigation brought on behalf of creditors, many of whom would satisfy Sir Rupert's test of being of modest means.

Point Two makes the point Sir Rupert had previously made in his Report, that recoverability "is an instrument of oppression, which is liable to crush defendants who have a good defence." Litigation needs to be a level playing field between claimants and defendants otherwise defendants who have not been guilty of misconduct may "be crushed into paying up." The recoverability regime does clearly encourage settlement. There is no evidence cited to support the argument that innocent parties have been crushed into settling. Defendants in insolvency litigation are frequently sophisticated users of limited liability and legal representation. Where a sound defence is suggested, IPs will usually walk away from pursuing litigation. I have come across no evidence of insolvency litigation being brought in the way Sir Rupert suggests. A point emphasised by many practitioners is that, in their view, the actions of defendants in insolvency litigation, typically culpable directors, have created an unlevel playing field in their favour and to the detriment of the creditors by leaving the company with no or only very few assets with which to take action to rectify their wrongdoing.

It is perhaps interesting to note that Sir Rupert's criticism of the way recoverability operated in the context of insolvency litigation is not dissimilar to how the Government envisages the new directors' disqualification compensation order regime considered above in section 3.5. As disqualification proceedings may be delayed for up to three years from a company's insolvency and then an application for a compensation order not made until a further two years have elapsed,

55 2015 Mustill Lecture entitled *The Civil Justice Reforms and Whether Insolvency Litigation Should be Exempt* delivered by Jackson LJ on 16 October 2015 ('Mustill Lecture') and found at: https://www.judiciary.gov.uk/wp-content/uploads/2015/10/mustill-jackson-lj.pdf.

56 2015 Mustill Lecture entitled *The Civil Justice Reforms and Whether Insolvency Litigation Should be Exempt* delivered by Jackson LJ on 16 October 2015 ('Mustill Lecture') and found at: https://www.judiciary.gov.uk/wp-content/uploads/2015/10/mustill-jackson-lj.pdf.

57 Perhaps the point made by Sir Rupert which had the most effect on the Ministry of Justice's decision to abolish the insolvency exemption was his suggestion that, despite the Supreme Court's decision in *Lawrence v Fen Tigers Ltd (No. 3)* [2015] UKSC 50; [2015] 1 WLR 3485 which held that the recoverability regime in general terms was not a breach of the European Convention on Human Rights, the retention of recoverability for insolvency litigation only might be a breach of Convention rights.

it could be argued that the delay in bringing proceedings is itself oppressive to a defendant. If one adds to the mix the way disqualification litigation is conducted with the threat that if the defendant fails to offer an undertaking, he or she will be liable for the Secretary of State's costs, a defendant who is reluctant to risk the costs of a trial could feel strong-armed into providing a disqualification and compensation undertaking. He or she might be seen to "be crushed into paying up". It is, of course, a question of balancing the rights of individual defendants on the one hand with the public interest on the other. A number of IPs interviewed for this Update see a similarity between how the disqualification compensation regime is to operate with how recoverability has previously operated. Both encourage a defendant to settle.

Point Three again repeats the point previously made by Sir Rupert that recoverability drives up overall costs of litigation. The overwhelming view of IPs who responded to the December 2015 R3 survey (and others to whom I have spoken), is that the actions of directors of insolvent companies frequently make litigation an uneven playing field by leaving a company with no assets. Those practitioners argue, especially with small value claims of £100,000 or less, that the absence of the insolvency carve-out will make it far less likely that action will be taken by IPs. There is clearly a public interest in ensuring litigation is carried out fairly with proportionate costs. There is also a public interest in ensuring those guilty of defeating creditors' claims are brought to justice. This is the difficult balance which the law must try to achieve. Sir Rupert's general points are clearly reasonable but do not take account of the nature of insolvency litigation.

Point Four argues that insolvency litigation is perfectly possible without recoverability. It is true that IPs did, of course, litigate successfully before recoverability was introduced in 2000. The problem, pointed out by practitioners with decades of experience, with the picture which Sir Rupert paints of insolvency litigation is that he is out-of-date. In the last century there were far fewer no-asset insolvent estates. Today's asset-based lenders such as debt factors and invoice discounters were fairly rarely encountered and there were a relatively small number of them. This is quite different now and a company's working capital is frequently not available to the IP to bring any action. Creditors, especially HMRC, were more willing to fund an action by an IP. HMRC was largely a preferential creditor in those days and so often stood to benefit significantly from successful litigation. As an unsecured creditor today, the incentive is not so great and, even if willing to support action, HMRC has extremely limited means to do so. Ordinary creditors who have already lost money are reluctant to risk more money on the off chance that they might recover some of their original debt (and get their further contribution back). In the twentieth century it was very common for a company to have a single secured creditor who would often fund insolvency litigation. Active creditors are a rarity nowadays.

The alternatives to the recoverability regime suggested by Sir Rupert include the use of CFAs without recoverability, increased use of funders[58] and the possible use of Damages Based Agreements which he accepts are problematic in practice at present. The future may hold a fixed costs regime for claims of £250,000 or less but that appears to be some way off.

The Walton Report explained that insolvency litigation has always been regarded as different to ordinary civil litigation due to its public benefit element. In addition to the alternatives suggested by Sir Rupert, perhaps it is time for the Government to consider other alternatives. Two possible models from Australia are discussed in the next section.

58 It will be interesting to see if the Government brings into effect Sir Rupert's previous recommendation that once the third party funding market had developed sufficiently, in the absence of a voluntary code of conduct to which all funders sign up, "there may well be a need for full statutory regulation" (*Review of Civil Litigation Costs: Final Report* TSO (December 2009) Chapter 11, para. 2.12).

5 Lessons From 'Down Under' – Other Options based upon the Australian system

5.1 Section 564 Corporations Act 2001[59]

Section 564 of the Australian Corporations Act 2001[60] gives the Court power to make an order in favour of creditors who have funded or indemnified the liquidator in litigation to recover, protect or preserve property for the benefit of the liquidation. If the litigation is successful, the liquidator will apply to the Court to assess how the funding creditors should be rewarded for providing the financial support for the action. Section 564 states that "the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them". The decision whether or not to make an order and, if so, on what terms, is left to the discretion of the Court after the recovery or preservation has been made.

There is a good deal of case law and commentary on s564 and it is clearly a well-established practice in Australia[61] for creditors of insolvent companies to agree to provide finance to enforce rights of the insolvent company often against the company's previous management team. It is common for the Court to order that, where the litigation is successful, the creditors receive back an amount equal to the funding or indemnity which they provided plus an uplift often in terms of a multiplier. The creditors also retain their rights to participate in any dividend in the liquidation (which may be possible only because of the successful litigation).

An example of how s564 worked very successfully and to the benefit of the funding creditors is the liquidation of Babcock & Brown Ltd.[62] The case involved over 1,200 individual creditors each contributing $400 to the funding of the liquidator's investigations into the company's affairs which ultimately resulted in a substantial settlement of claims against company directors and its former auditor. The Court made an order under s564 that, in addition to receiving the repayment of their financial contribution to the fighting fund, the funding creditors were also to receive an uplift of ten times the amount of their respective contributions. All these payments were ordered to be made in priority to the payment of any dividend to unsecured creditors generally.

Although the Babcock & Brown case involved "crowd funding" in a large insolvency, s564 is also seen to work effectively in smaller cases where there is only one[63] or two[64] funding creditors.

59 I am most grateful to Mark Wellard of Charles Darwin University for his guidance on how the Australian Fair Entitlement Recovery Programme operates and how it came into being.
60 For the full text of s564 see http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s564.html.
61 Section 564 is derived from its bankruptcy equivalent found in s109(10) of the Australian Bankruptcy Act 1966.
62 For details see the liquidator's report to creditors found at: http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/CRG/Bus%20under%20admin/Babcock%20and%20Brown/Deloitte_BBL_circular_20Mar2012.pdf.
63 See e.g. *Re Allquip (W.A.) Pty Ltd (in liquidation)* [1997] FCA 1368 http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1997/1368.html?stem=0&synonyms=0&query=cartco.
64 See e.g. *Re Glenisia Investments Pty (In Liquidation)* [1995] FCA 1490 http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1995/1490.html?stem=0&synonyms=0&query=glenisia.

There are significant benefits to the s564 scheme. One oft expressed concern of insolvency mechanisms is that creditors, especially unsecured creditors, become completely disenfranchised. They are loath to waste their time attending creditors' meetings and are usually extremely reluctant to fund litigation as they see it as "throwing good money after bad". Even if the litigation is successful, there is no mechanism available in the UK whereby they are able to receive any sum back from the action beyond their contribution to the fighting fund (and if there are sufficient assets to a dividend from the estate). Section 564 answers this weakness by promising an increased return to funding creditors ahead of other unsecured creditors who chose not to participate in the funding.[65]

Section 564 also encourages creditors to remain interested in the insolvency[66] and where culpable directors are aware of the strength of support from the creditor body to hold them to account for their wrongdoing, the demonstration of that commitment by risking further funds is likely to be a significant factor in such directors suggesting early settlement of the claim.

One concern expressed about both the recoverability of CFA uplifts (and ATE premiums) and the use of third party funders is that parties outside of the creditor group get to benefit in varying ways from the eventual proceeds of an action. If an action is funded by existing creditors with the promise of an increased return, all the proceeds go to those inside the creditor group (subject to costs and expenses).

From the point of view of an IP, it was often seen under the insolvency carve-out to be more attractive for the IP to use a CFA to litigate than to consider a third party funder. In theory, recoverability of the CFA uplift from a losing defendant should mean that, absent unusual cases, a better return is likely to the estate than would be the case if the action was brought with the support of a funder. There is no percentage deduction and all legal fees and uplift are capable of being recovered. The experience of Manolete supports this idea in that it is only approached in 90% of cases once the IP's legal team have rejected the use of a CFA. In future, such recoverability will no longer be available and so a large proportion of any damages recovered will go to people outside the creditor group (either the legal team under a CFA or a third party funder under a funding agreement).

If a version of s564 were to be introduced in the UK, the IP with a "no asset" estate but who is considering litigation would perhaps first consider asking creditors if they wished to support the action financially before considering a possible CFA or use of a third party funder. It would enfranchise creditors to some extent even if they chose not to take up the offer. It would also perhaps give those creditors a clearer understanding of the difficult commercial decisions facing an IP. If creditors are unwilling to support any action, it would be difficult for them to complain subsequently if the IP prosecuted the action either using a CFA (with or without the support of a funder) or who assigned the cause of action directly to a funder.

As there is a pre-existing body of case law decided under s564, there would be ready-made guidance available to the UK courts in making assessments of how funding creditors' reward should be quantified.

65 The recent case of *Low v Barnet* [2015] FCA 1386 suggests that a creditor cannot receive more than 100% of the total debt owed (together with interest) by means of an order made under s564.

66 The court commented in *Filsee Pty Ltd & Ors v Horne* [2014] FCCA 2269 that the object of such provisions is to "encourage creditors to indemnify [IPs] in relation to proceedings for recovery of property; and …reward creditors who take the risks and bear the burden of litigation … The discretion is broad and general but is to be exercised having regard to the desirability, in the public interest, of encouraging creditors to indemnify [IPs]" (paras 9 -10 per Judge Harnett).

An article on the website of a leading Australian insolvency practitioner firm[67] entitled "Creditor funding where the liquidator has limited means to recover or preserve company assets" concludes with the following observations on s564:

"Often the whole amount available in a winding up has been sourced from recoveries made possible by reason of the contribution made by funding creditors. Such creditors, taking advantage of the financial incentives offered under section 564, have made a commercial decision to become actively involved in the winding up process by investing time and money assisting the liquidator to recover or preserve company property. At the same time the public interest has been served in ensuring that assets of the company in winding up will be maximized, and misconduct with respect to companies in financial difficulties will be discouraged."

5.2 Australian Fair Entitlement Recovery Programme[68]

The Australian Fair Entitlements Guarantee ('FEG') was introduced in 2012[69] and operates in a similar way to its UK equivalent Redundancy Payments Service in providing financial support to employees who lose their jobs when their employer becomes formally insolvent. The FEG operates in a broadly similar way to the UK scheme in that in relation to payments made to employees, the FEG has a right of subrogation against the insolvent employer. Employees in Australia have a status similar to the preferential status of limited employee liabilities in the UK under Sch 6, Insolvency Act 1986 and the FEG stands in the shoes of those employees when trying to recoup money paid out to employees in relation to their priority status.

It has been recognised that the Australian Government might improve its overall financial exposure under the FEG by taking a more active role in funding the enforcement of claims against directors of insolvent companies.[70] A previous Active Creditor Pilot scheme showed that Government funding used to support such actions (leading to a return to creditors) showed a 562 per cent return on the cost of providing that funding.[71] The Australian Government's Productivity Commission subsequently recommended that the Active Creditor Pilot become permanent and the Australian Government has subsequently created the Fair Entitlement Recovery Programme which was launched in July 2015. This scheme allows liquidators of impecunious estates to apply for funding to support litigation.[72]

Although there is no evidence that the UK Redundancy Payments Service engages in litigation funding, it is clear that on occasion HMRC does support or indemnify IPs who take legal action on behalf of creditors. Sir Rupert Jackson in his Mustill Lecture appears to express confusion as to why HMRC is currently reluctant to engage in significant support for insolvency litigation.[73] Perhaps if the Government considered the introduction of an active creditor scheme similar to the one in Australia (supported by either or both the Redundancy Payments Service or HMRC) more actions could be pursued.

67 http://briferrier.com.au/insights-and-news/technical-insights/creditor-funding-where-the-liquidator-has-limited-means-to-recover-or-preserve-company-assets/. The firm is BVI Ferrier and the article is dated March 2015.

68 I am most grateful to Mark Wellard of Charles Darwin University for his guidance on how the Australian Fair Entitlement Recovery Programme operates and how it came into being.

69 Prior to 2012, a similar scheme called the General Employee Entitlements and Redundancy Scheme operated in Australia (2001 – 2012) and before that the similar Employee Entitlements Support Scheme operated (from 2000). See generally Production Commission 2015, *Business Set-Up, Transfer and Closure*, Final Report 75, Canberra.

70 *Production Commission, Business Set-Up, Transfer and Closure* at p 421.

71 Wellard (2013) *Bailing out the FEG: is the Fair Entitlements Guarantee (formerly GEERS) Approaching its own Fiscal Cliff?* Queensland University of Technology at p 8.

72 *Production Commission, Business Set-Up, Transfer and Closure* at p 421.

73 2015 Mustill Lecture entitled *The Civil Justice Reforms and Whether Insolvency Litigation Should be Exempt* delivered by Jackson LJ on 16 October 2015 ('Mustill Lecture') and found at: https://www.judiciary.gov.uk/wp-content/uploads/2015/10/mustill-jackson-lj.pdf at para 8.4.

6 Conclusions

The Government's decision to remove the insolvency exemption has been made by the Ministry of Justice and appears to be based upon general litigation policy considerations rather than looking at the specific challenges and public policy imperatives present in insolvency litigation. The evidence suggests that a large proportion of CFA-backed actions previously pursued by IPs, mainly in cases where there were no or minimal assets available to fund litigation, will not be financially viable using CFAs in the future. It is undoubtedly the case that the third party funding market will pick up a number of these cases but it is difficult to see it taking on all of the cases which IPs view as no longer financially viable under a CFA.

Rather unpredictably, the announcement in 2012[74] that the insolvency exemption from the LASPO reforms would come to an end, initially in April 2015 but then extended to April 2016, appears to have led to an increase in the use of CFA-backed litigation by IPs. This may be explained by a greater awareness of the way in which the recoverability regime operated to the benefit of insolvent estates. Whatever the reasons, it is clear that the last two years saw a significant increase in the use by IPs of CFAs. It would also seem that IPs have shown a greater openness to working with, or assigning claims to, third party funders.

It is estimated that claims valued at over £1bn were pursued by IPs in 2014 using CFAs (up from the figure from 2010 suggested in the Walton Report of £300m). These cases are likely to make up a sizeable majority of all insolvency litigation (approximately 85%). It is also noteworthy that a similar percentage of cases (86%) appear to involve estates with no or few assets. It appears that approximately half the total value claimed was eventually recovered by IPs (a figure in excess of £500m). The market for third parties funding insolvency litigation appears to have expanded in the same timeframe and is likely to realise at least £50m per annum for insolvent estates.

The third party funding market is still growing and although it appears currently to have garnered approximately 10% of the overall insolvency litigation market this may be a conservative estimate and is likely to increase further now that the insolvency exemption to LASPO has been removed. Recent changes to legislation which permit an IP to assign all types of causes of action are designed to encourage the funding market.

In large value cases (where the value claimed exceeds £250,000) an IP now has a more difficult commercial decision to make than in the recent past as how best to realise the value of the claim. The loss of recoverability means that the cost of CFA uplifts and ATE insurance premiums will need to be met by any eventual settlement or damages award. Once the IP's own fees are factored in, there may be cases where the sale of a cause of action to a third party funder may reap a better return for the creditors than CFA-backed litigation run by the IP. It would seem a good time for the IP profession to receive some clear guidance on how to agree CFA uplifts.

Under the pre-LASPO regime, most IPs would view a CFA as their preferred option in most cases with an approach to a third party funder only considered in unusual circumstances or where a CFA could not be arranged. This will change and IPs will need to consider more carefully what course of action will lead to a more beneficial result for creditors. It is conceivable that IPs who continue

74 See the Ministerial Statement dated 24th May 2012 by the then Minister of Justice Jonathan Djanogly.

to agree 100% CFA uplifts as a matter of course, may find themselves accused of a breach of duty by creditors if the payment of such uplifts contributes to a reduced dividend (or no dividend at all) to unsecured creditors. IPs will need to consider alternative funding arrangements including approaching third party funders. Indeed half of respondents to the R3 survey see that the loss of the LASPO exemption will lead them to consider approaching funders when perhaps previously they would not. Worryingly, from a public policy point of view, half of respondents believe they will reduce or avoid insolvency litigation in future.

IPs will be in a difficult position. What alternatives are there? If the secondary legislation around damages based agreements can be amended, it might be that IPs can use a hybrid version of that mechanism to fund some actions.[75] Nearly four years after LASPO, this possibility remains just that, a future possibility. Although the Insolvency Service intends to use its new statutory powers to request a compensation order (or undertaking) following disqualification of a director, these powers are not likely to involve large numbers of cases. If the Ministry of Justice's take on the compensation order regime is accurate, it will be aimed at directors at the bottom of the economic pile. Either way it will not realistically be capable of being pursued for at least two or three years and will have only a minimal impact on the type of cases which are currently brought by IPs. Few other options are currently available for chasing errant directors (and others who are guilty of culpable behaviour in relation to an insolvent estate).

Perhaps it is time for the Government to consider alternatives designed to enfranchise and reward those who suffer most in an insolvency – the creditors. The previous Government was keen to encourage creditors to be fully engaged in the formal insolvency of their debtors.[76] There is currently little incentive for creditors to support financially litigation by IPs. This could be changed in a manner which is likely to engage and benefit creditors, force culpable persons to compensate for loss caused by their actions and which would encourage a better understanding of the difficult task faced by IPs. If funding options similar to the Australian s564 were to be introduced, creditors would have the chance to fund litigation but with the incentive to recover a larger amount than their funding contribution. They would also stand to benefit from any eventual creditor dividend. If creditors were offered the opportunity to engage in such funding they could either accept or refuse the challenge. If the proposal is rejected, the IP could then consider other funding options including the use of a CFA or a third party funder. If a new scheme based upon the Australian model were to be introduced, the publicity surrounding its introduction might lead to a level of awareness both within the profession and within creditor bodies which might serve to encourage creditors to take part in the new scheme.

In addition, it is clearly Sir Rupert Jackson's view that HMRC should do more to fund insolvency litigation where it is a creditor. The same could be said of the Redundancy Payments Service. There would seem every reason for the Government to consider filling the funding gap created by the ending of the insolvency exemption by creating a form of Active Creditor Scheme which would permit IPs to apply to either or both HMRC and the Redundancy Payments Service for funding. The Australian experience of such a scheme is that it leads to a return of over 500% of the cost of providing such funding.

75 See the commentary in the Walton Report at pp 42-43.
76 See generally *Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business* Department for Business, Innovation and Skills Discussion Paper 2013.

Insolvency litigation is not ordinary litigation.[77] In commenting on the nature of insolvency litigation, Lord Millett, in *Re Pantmaenog Timber Co Ltd,*[78] endorsed the views of the Cork Committee[79] in the following terms:

> *"From the earliest days of the joint stock company the liquidator has exercised functions which serve the public interest and not merely the financial interests of the creditors and contributories. The Cork Committee observed (in para 192 of its report) that: 'The law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society.' In consequence insolvency proceedings: 'have never been treated in English law as an exclusively private matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them' (para 1734)."*[80]

Perhaps it is time for the current Government to re-consider how best it can encourage the public interest elements of such litigation whilst recognising broader principles of conducting litigation fairly.

77 See generally the discussion in Part 3 of the Walton Report.
78 [2004] 1 AC 158.
79 *Review Committee on Insolvency Law and Practice* (1982 Cmnd. 8558).
80 *Ibid* at para 52. Similar comments were made by Lord Walker in the same case at paras 78-79. See also Dillon LJ in *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 where his Lordship referred to the law's previous inability to deal adequately with the dishonesty or malpractice of bankrupts and directors being "a matter of public concern, and there is a public interest in putting it right."

Appendix A

Anonymised Sanctions Requests in 2014

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
1	Guarantee	133,398	140,000	721	65	75	Yes if summary judgment application fails
2	212, 238,239 and 320 CA	450,000	60,000	-1,407	Counsel's advice	100	Yes
3	127, 212, 238, and 423	27,000	22,500	12	Solicitors believe there is a claim to pursue	40	Yes
4	127	156,000	4,000	-1,114	Due to freezing orders the IP has no alternative than to pursue - no percentage provided	Details to follow	No
5	DLA	58,900	20% of recoveries	-1,860	Not stated	20% of recoveries	No
6	212	Not stated but no dividend possible to unsecured creditors without successful litigation	200,000	0	75	100	Yes
7	MTIC fraud	750,000	150,000	4,545	70	75	Yes
8	Debt	16,560	11,750	0	80	100	Not yet - if needed will be paid for by IP's firm
9	212, 239	74,708	49,402	-154	Not Stated	30	Yes

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
10	212	2,000,000	100,000	12,407	65	100	Yes
11	212	700,000	100,000	12,407	65	100	Yes
12	212	2,000,000	100,000	12,407	65	100	yes
13	212	60,000	15,000	1,302	70	50	Yes
14	Guarantee	1,500,000	332,000	0	Good	30	Yes
15	212	38,733,444	1,500,000	0	Not stated	75	No HMRC indemnity
16	212	251,932	12,500	-841	Good	50	Not stated
17	212	590,000	70,000	-453	Not stated	74.5	Not stated
18	Prof negligence	57,000,000	3,360,817	9,194	65	70	Yes
19	212, 213, 423 and 320 CA	465,171	100,000	-1,423	Solicitors' advice	100	Yes
20	238, 239 and 423	230,000	40,000	-1,235	Good	100	Yes
21	212, 213, 214	600,000	90,000	-458	65	3 actions against 3 directors - uplift 55.5, 66.5, 74.5	Yes
22	212	905,000	225,000	-843	65	75	Yes
23	212	445,792	42,500	-1,836	53	100	Yes
24	212	190,386	7,500	-1,158	Good	100	No
25	212	550,391	15,000	-1,136	Good	50	No
26	212	385,452	25,000	26,836	Good	100	Yes
27	212, 213 and 127	1,375,000	120,000	326,808	75	95	Yes

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
28	Debt	142,560	20,000	775	Good	50	Yes
29	212, 213	4,000,000	700,000	-1,876	65	92	Not stated
30	127, 239	200,000	118,019	14,122	Good	0	No
31	Debt	225,046	50,000	-1,386	Good	55	Yes
32	212	365,984	20,000	-1,881	Good	50	Yes
33	212	752,253	128,450	10,000	70	65	Yes
34	212	49,981	7,500	-1,770	Good	50	Not stated
35	212	498,910	15,000	-3,280	Good	50	Not stated
36	212, 214	191,212	25,000	-1,782	Good	50	Yes
37	127, 212, 238 and 239,	106,616	20,000	21,524	Good	50	Yes
38	212	1,333,000	230,000	129,451	60	50	Yes
39	212, 238	250,000	100,000	-1,724	60	67	Yes
40	212, 216, 238, 239 and 847 CA	35,000	32,500	-1,421	60	100	Yes
41	MTIC fraud	8,053,931	165,000	3,363	Good	50	Yes
42	212	50,000	57,500	-2,005	65	100	Not stated
43	212, 238, 197 CA	815,448	278,273	-1,136	Good	75	Yes

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
44	Realise property abroad	15,000,000	30,000	-1,180	60	100	Not stated
45	212 and 847 CA	427,899	15,000	-3,103	Good	50	Not stated
46	197 CA	452,039	6,000	-1,158	Good	100	No
47	212	50,000	10,000	-1,901	65	50	Yes
48	212, 238	83,829	42,500	136	60	100	Yes
49	212, 847 CA	476,289	15,000	-3,089	Good	50	Not stated
50	212, 847 CA	287,956	15,000	-720	Good	50	Not stated
51	Prof negligence	1,287,225	300,000	-1,743	Real prospect of success	75	ATE
52	Debt	878,000	Not stated	6,468	Good	100	No but third party funder approached to provide indemnity
53	212	19,224	10,000	-1,461	Good	50	Yes
54	212, 213	283,180	50,000	-1,366	Very good	100	Yes
55	212, 197 CA	151,259	15,000	-3,289	Good	50	Not stated
56	214	141,864	5,000	-1,136	70	30	Yes
57	Enforcement of debt by petitioning for bankruptcy	549,786	2,500	-1,439	Good	100	Not needed
58	212, 239	111,106	42,500	25	60	100	Yes
59	212, 239	20,000	0	15,614	Good	100	Yes
60	213, 212	1,123,468	100,000	19,458	75	95	Yes

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
61	212	347,309	12,500	-1,425	Not stated	100	Not yet
62	212, 214, 216, 239	60,000	25,000	-1,079	75	100	Not stated
63	847 CA and DLA	521,680	30,000	-808	60	50	Yes if needed
64	130	Not stated	2,000	-1,158	Good	75	Not stated
65	238, 239, 212	508,165	30,000	-1,515	Good	50	Yes
66	212, 238, 239, 423	3,430,025	500,000	226	65	75	Yes
67	212, 213, 214 and 239	846,000	95,000	1,949	70	100	Yes
68	212	1,150,000	75,000	-347	60	75	Yes
69	212	67,531	7,500	-3,310	Good	50	Not Stated
70	239	18,000	Not known	-1,090	Good	Not stated	No
71	238	125,500	Not known	-1,090		Not stated	No
72	238, 239, 212	112,913	10,000	867	Good	50	Yes
73	213, s15 CDDA	136,701	35,000	12,718	75	95	Yes
74	213, s15 CDDA	1,227,000	55,000	-1,180	75	95	Yes
75	212, 238, 239 and 847 CA	95,630	40,500	-1,136	65	Not stated	Yes
76	423	133,404	80,000	Not stated	60	100	Yes
77	212	929,902	70,167	0	Good	25	Yes

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
78	238	1,133,029	100,000	-2,315	Very good	100	Yes
79	423	1,000,000	100,000	-997	70	100	Yes
80	Misrepresentation and breach of contractual/ fiduciary duty	33,000,000	2,280,461	(1,257) and (23,152)	65	30	Yes
81	DLA	452,039	10,000	-1,158	Good	100	No
82	212, DLA	89,940	12,000	66,552	60	100	Yes
83	127	30,000	7,500	10,299	Good	50	Yes
84	127 and 238	595,000	75,000	0	Good	75	Yes
85	212, 238 and 239	10,939	5,000	317	70	73	Yes
86	127	60,000	10,000	0	Probable	100	Third Party Funder
87	Insurance claim under 1930 Act	1,700,000	452,775	4,702	50%	40	Creditor funding along with third party funder
88	214, 212, 239	749,642	40,000	-385	Good	50	Yes
89	212	250,585	7,500	-477	Good	50	Not stated
90	127, 212	400,000	35,000	-1,070	Good	0	Not stated
91	212	66,139	15,000	-3,356	Good	50	Not stated
92	127, 212, 213, 238	2,095,950	200,000	1,724	Good	100	Yes
93	212, 213, 238, 239	118,679	45,000	5,467	Good	50	Yes
94	212	136,053	20,000	-1,086	Good	100	Yes
95	212, 239	108,251	73,725	5,001	Good	100	Yes
96	213	Not Stated	5,000	-1,299	75	75	If necessary

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
97	212	15,000	11,500	1,014	70	100	If necessary
98	127	207,000	3,000	329	Good	0	No
99	MTIC fraud	Not stated	15,000	4,462	Reasonable	100	No
100	212	17,500,000	1,000,000	-1,826	60	100	Yes
101	212	163,889	15,000	-3,320	65	50	If necessary
102	212, 214, 239	850,000	50,000	0	Good	100	Yes
103	212	288,000	5,000	-1,092	90	0	No
104	Guarantee	977,629	10,000	-1,092	65	53	No
105	238, 239	85,000	12,500	1,264	75	TBC	Yes
106	212	166,902	50,000	-1,111	Good	50	Yes
107	212	2,820,516	200,000	21,684	75	95	Yes
108	212	128,987	15,000	4,974	Good	50	Not stated
109	212, DLA	154,139	4,000	-2,323	75	100	No
110	127, 212, 214 and 238	1,200,000	100,000	-292	Good	75	Yes
111	Debt and 212	190,000	20,000	-1,518	High	75	No
112	212, 238	750,000	225,000	0	60	90	Yes
113	212, 127	1,400,000	150,000	-1,195	Good	75	Yes
114	212, 238	126,950	75,000	31,051	Good	75	Yes

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
115	127, 212	301,146	30,000	1,097	65	100	Yes
116	127, 212, 214, 238 and 239	1,251,019	100,000	-1,272	Very good	100	Yes
117	Debt	24,635	10,000	1,455	Reasonable	87	No
118	Debt	52,000	10,000	-1,167	High prospect	65	Yes
119	127, 212 and 847 CA	298,355	18,000	697	80	100	Yes
120	238	700,000	75,000	-1,092	65	53	Yes
121	238	36,700	7,500	130	Good	70	Yes
122	212, 238	1,014,065	250,000	-1,202	Good	75	Yes
123	127	2,592	650	1,021	Very good	0	No
124	Possession and sale	1,750,000	10,000	-1,469	65	50	Yes
125	127, 212, 239 and 847 CA	180,000	50,000	436	70	50	Yes
126	239	20,000	20,000	0	Good	50	No
127	212, 213	2,132,175	150,000	-1,202	65	75	
128	Civil claimant as part of Swiss criminal proceedings	400,000	30,000	-755	50	50	No
129	127	20,862	3,500	0	Very high	0	No

	Type of Action	Value of Claim	Base Costs	Value of estate	Success %	CFA uplift %	ATE
130	212	230,311	50,000	6	Good	100	No
131	127	108,550	50,000	10,177	Good	75	No
132	212, 847 CA	85,000	15,000	-1,473	65	50	If necessary
133	212, 847 CA	2,508,953	255,000	0	60	100	Yes or 3P Funding

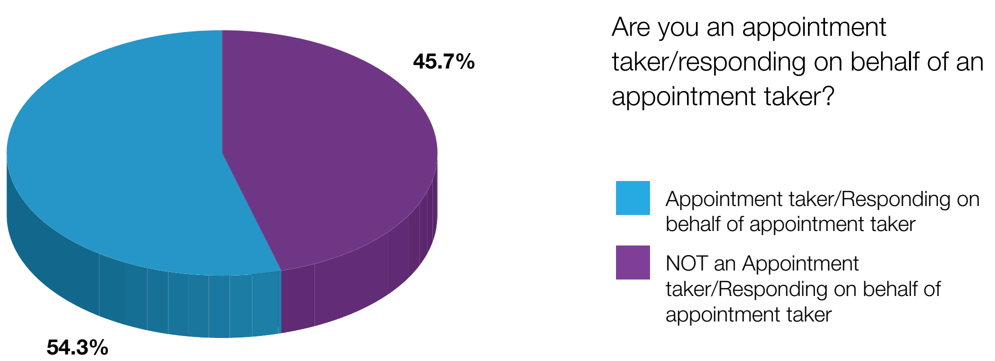
Appendix B

R3 survey questions and responses, December 2015

Question 1

Are you an appointment taker/responding on behalf of an appointment taker?

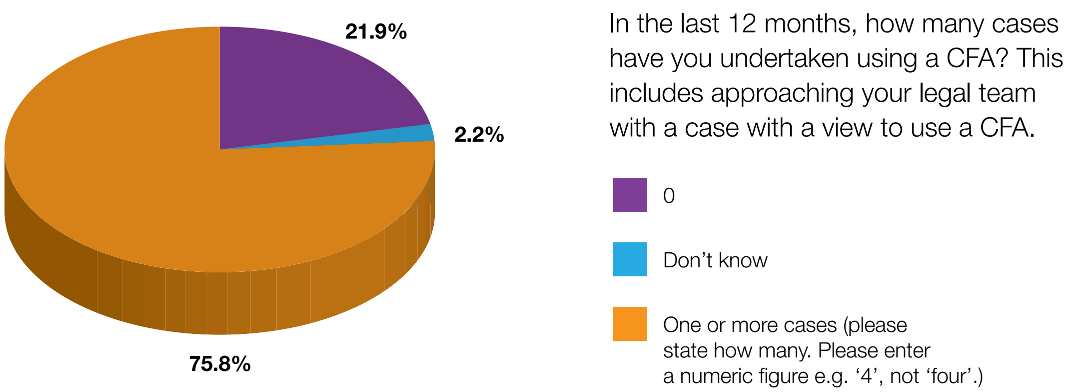
Answer Options	Response Percent	Response Count
Appointment taker/Responding on behalf of appointment taker	54.3%	183
NOT an Appointment taker/Responding on behalf of appointment taker	45.7%	154
answered question		**337**
skipped question		**0**



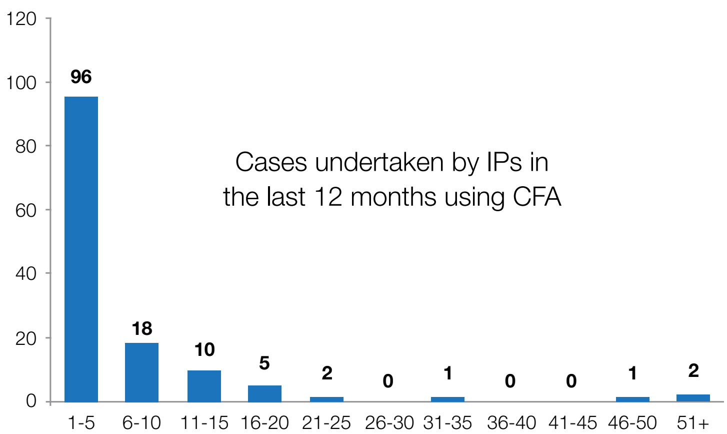
Question 2

In the last 12 months, how many cases have you undertaken using a CFA? This includes approaching your legal team with a case with a view to use a CFA.

Answer Options	Response Percent	Response Count
0	21.9%	39
Don't Know	2.2%	4
One or more cases (Please state how many. Please enter a numeric figure e.g. '4', not 'four'.)	75.8%	135
	answered question	**178**
	skipped question	**159**



Total	920
Mean	6.81
Median	2
Mode	3

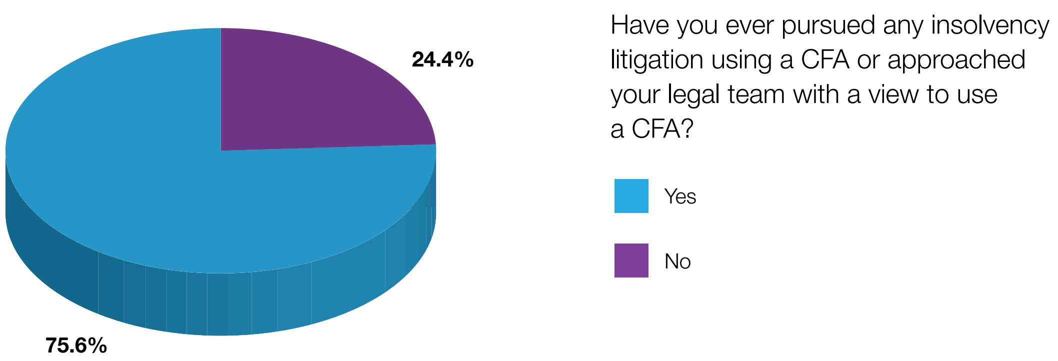


Question 3

Answered by people that did not undertake a case using a CFA in the last 12 months

Have you ever pursued any insolvency litigation using a CFA or approached your legal team with a view to use a CFA?

Answer Options	Response Percent	Response Count
Yes	75.6%	34
No	24.4%	11
	answered question	**45**
	skipped question	**292**

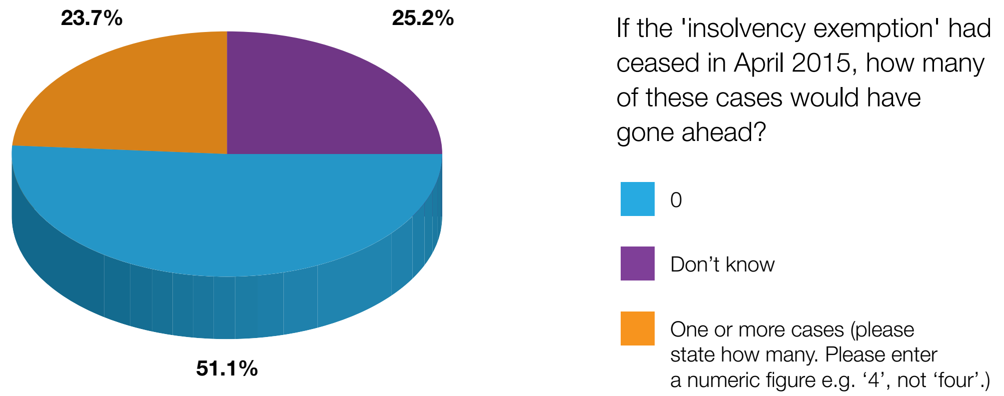


Question 4

Answered by people that had used a CFA in the last 12 months

If the 'insolvency exemption' had ceased in April 2015, how many of these cases would have gone ahead?

Answer Options	Response Percent	Response Count
0	51.1%	67
Don't know	25.2%	33
One or more cases would have gone ahead (Please state how many. Please enter a numeric figure e.g. '4', not 'four'.)	23.7%	31
answered question		**131**
skipped question		**206**



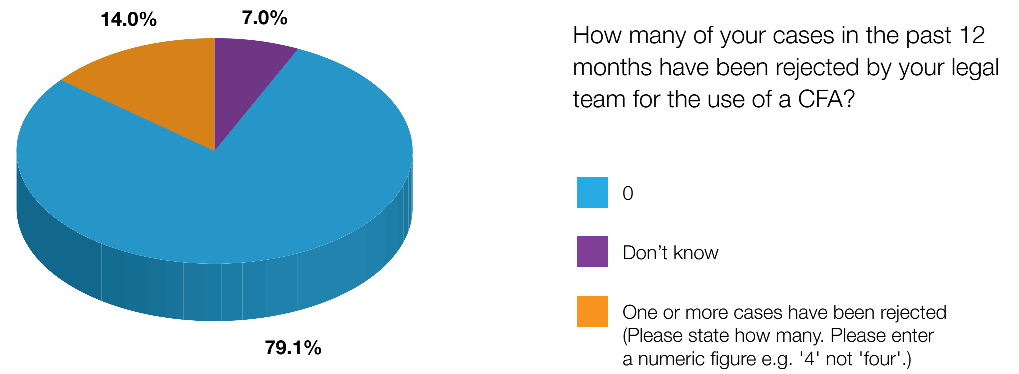
Total	90
Mean	2.90
Median	2
Mode	1
% of cases actually undertaken	9.78%

Question 5

Answered by people that had undertaken a CFA in the last 12 months

How many of your cases in the past 12 months have been rejected by your legal team for the use of a CFA?

Answer Options	Response Percent	Response Count
0	79.1%	102
Don't know	7.0%	9
One or more cases have been rejected (Please state how many. Please enter a numeric figure e.g. '4' not 'four'.)	14.0%	18
	answered question	**129**
	skipped question	**208**



Of those who had cases rejected.

Total	33
Mean	1.83
Median	2
Mode	2
% of cases undertaken	3.59%

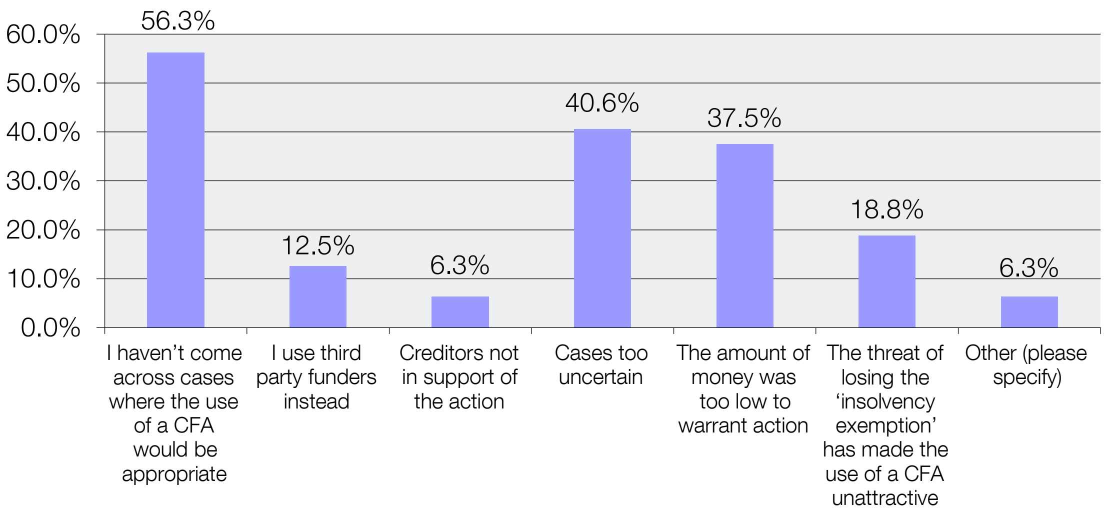
Question 6

Answered by people that have not undertaken a CFA in the last 12 months (excl. people that have never used a CFA)

Which of the reasons listed below, if any, explain why you have not undertaken any insolvency litigation using a CFA in the past 12 months. Please select all that apply. If none of these options apply, please write in your answer under 'other'. NB. If you have approached your lawyers about using a CFA in a case and they have rejected the case, this still counts as having undertaken insolvency litigation using a CFA.

Answer Options	Response Percent	Response Count
I haven't come across cases where the use of a CFA would be appropriate	56.3%	18
I use third party funders instead	12.5%	4
Creditors not in support of the action	6.3%	2
Cases too uncertain	40.6%	13
The amount of money was too low to warrant action	37.5%	12
The threat of losing the 'insolvency exemption' has made the use of a CFA unattractive	18.8%	6
Other (please specify)	6.3%	2
	answered question	**32**
	skipped question	**305**

Which of the reasons listed below, if any, explain why you have not undertaken any insolvency litigation using a CFA in the past 12 months.Please select all that apply.



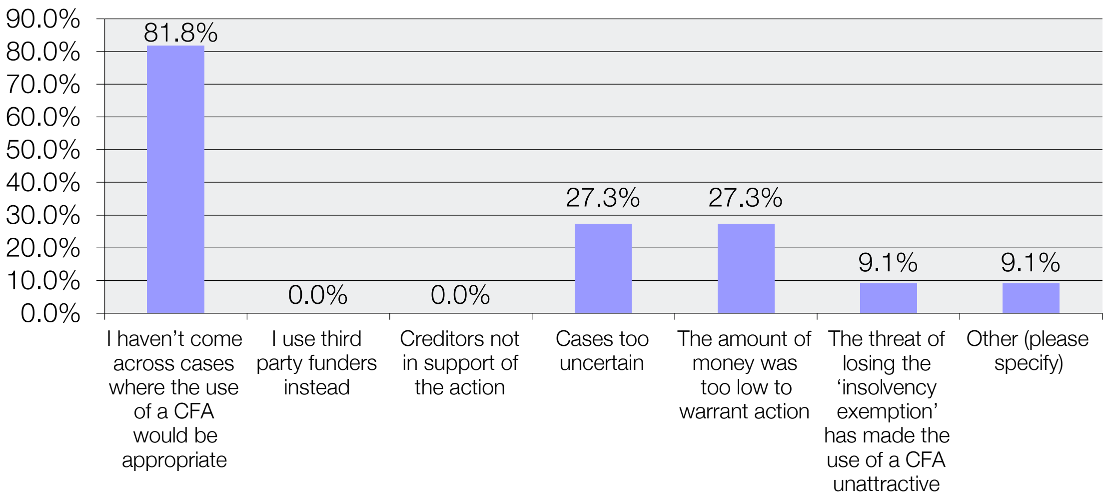
Question 7

Answered by people that had never undertaken a CFA

Which of the reasons listed below, if any, explain why you have not undertaken any insolvency litigation using a CFA? Please select all that apply. If none of these options apply, please write in your answer under 'other'. NB. If you have approached your lawyers about using a CFA in a case and they have rejected the case, this still counts as having undertaken insolvency litigation using a CFA.

Answer Options	Response Percent	Response Count
I haven't come across cases where the use of a CFA would be appropriate	81.8%	9
I use third party funders instead	0.0%	0
Creditors not in support of the action	0.0%	0
Cases too uncertain	27.3%	3
The amount of money was too low to warrant action	27.3%	3
The threat of losing the 'insolvency exemption' has made the use of a CFA unattractive	9.1%	1
Other (please specify)	9.1%	1
answered question		**11**
skipped question		**326**

Which of the reasons listed below, if any, explain why you have not undertaken any insolvency litigation using a CFA?Please select all that apply.

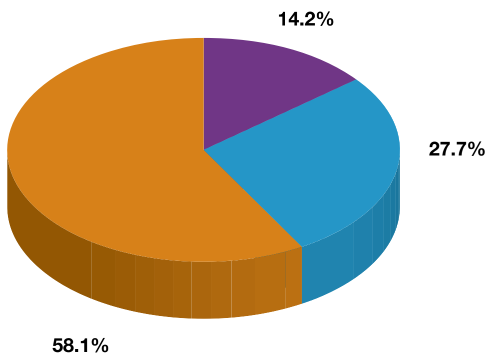


Question 8

Answered by anyone that has used a CFA before

Looking back at your individual caseload, approximately how much value (in total) was brought back into insolvent estates with which you are involved by CFA-backed litigation in the last 12 months? Please include any value returned from any of your cases regardless of when they first started.

Answer Options	Response Percent	Response Count
£0	27.7%	43
Don't know	14.2%	22
£1 or more (Please state how much. Please enter a numeric figure e.g. '4' not 'four'. Do not include the '£' sign. Please do not include commas in your answer.)	58.1%	90
	answered question	**155**
	skipped question	**182**



Looking back at your individual caseload, approximately how much value (in total) was brought back into insolvent estates with which you are involved by CFA-backed litigation in the last 12 months?

- £0
- Don't know
- £1 or more (Please state how much. Please enter a numeric figure e.g. '4' not 'four'. Do not include the '£' sign. Please do not include commas in your answer.)

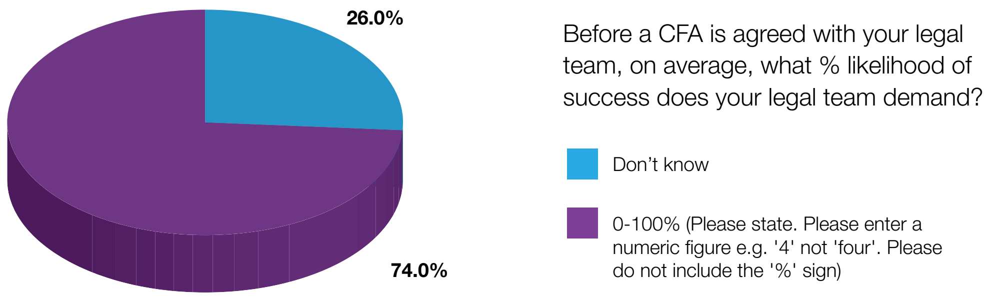
Total	£193,365,474
Mean	£2,197,335
Median	£242,500

Question 9

Answered by anyone that has used a CFA

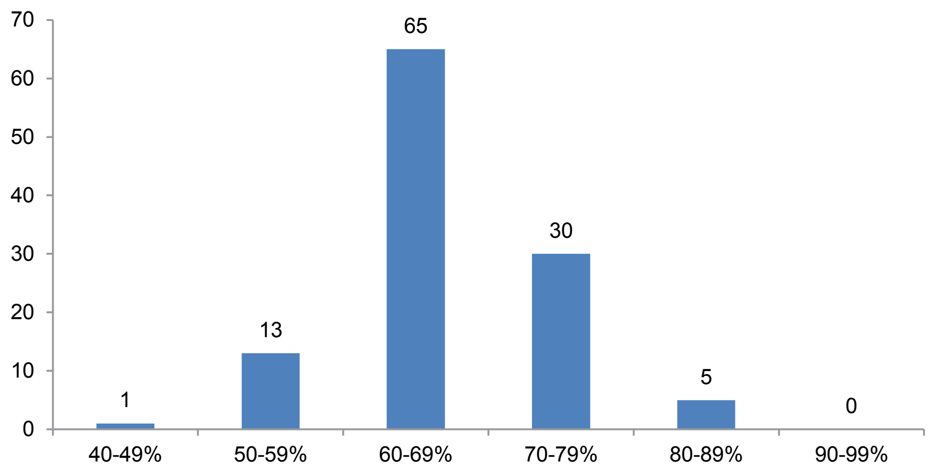
Before a CFA is agreed with your legal team, on average, what % likelihood of success does your legal team demand?

Answer Options	Response Percent	Response Count
Don't know	26.0%	40
0-100% (Please state. Please enter a numeric figure e.g. '4' not 'four'. Please do not include the '%' sign)	74.0%	114
answered question		**154**
skipped question		**183**



Mean	64%
Median	65%
Mode	60%

% success demanded by legal teams prior to agreeing CFA-backed course of action

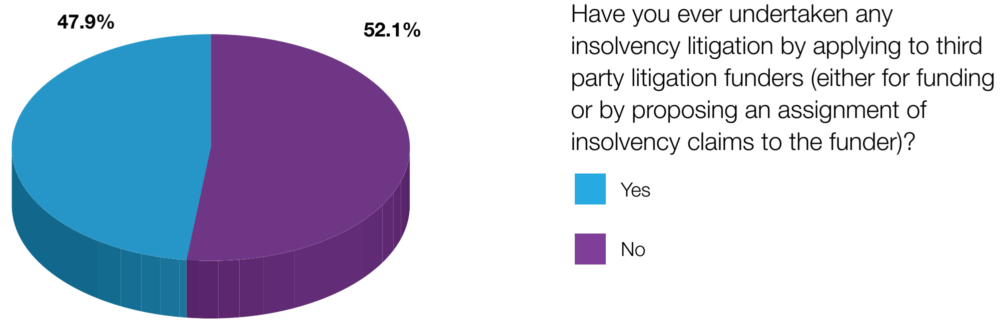


Question 10

Answered by all appointment takers

Have you ever undertaken any insolvency litigation by applying to third party litigation funders (either for funding or by proposing an assignment of insolvency claims to the funder)?

Answer Options	Response Percent	Response Count
Yes	47.9%	79
No	52.1%	86
	answered question	**165**
	skipped question	**172**

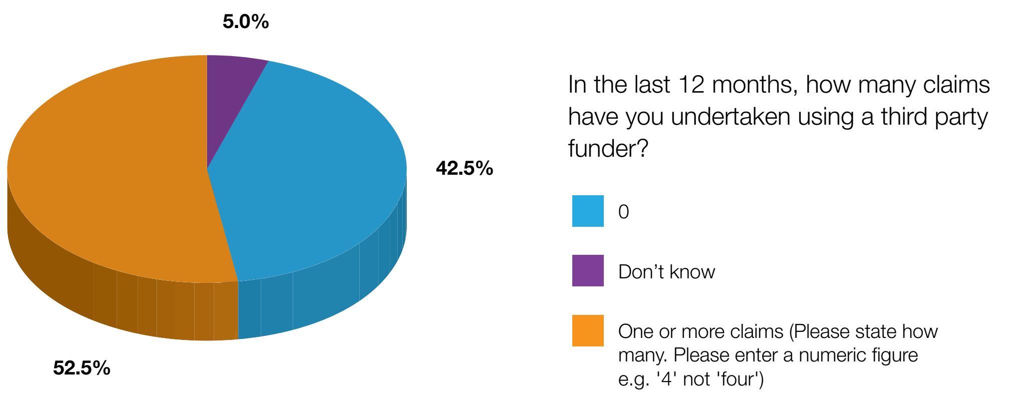


Question 11

Answered by all who have used a third party funder

In the last 12 months, how many claims have you undertaken using a third party funder?

Answer Options	Response Percent	Response Count
0	42.5%	34
Don't know	5.0%	4
One or more claims (Please state how many. Please enter a numeric figure e.g. '4' not 'four')	52.5%	42
answered question		**80**
skipped question		**257**



Total	64
Mean	1.52
Median	1
Mode	1

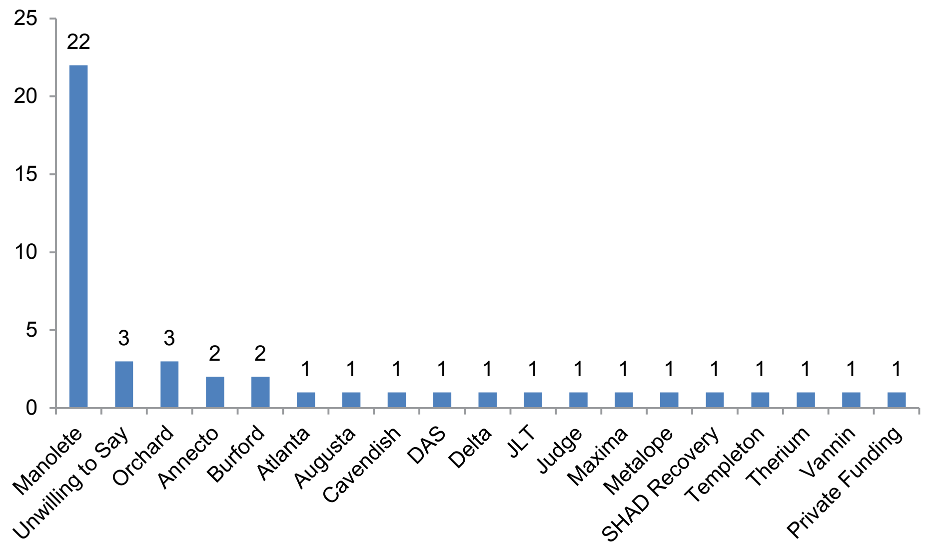
Question 12

Answered by all who used a third party funder last year

Which third party funders have you used in the last 12 months?

Answer Options	Response Count
	42
answered question	**42**
skipped question	**295**

Third party funders used by IPs in last 12 months



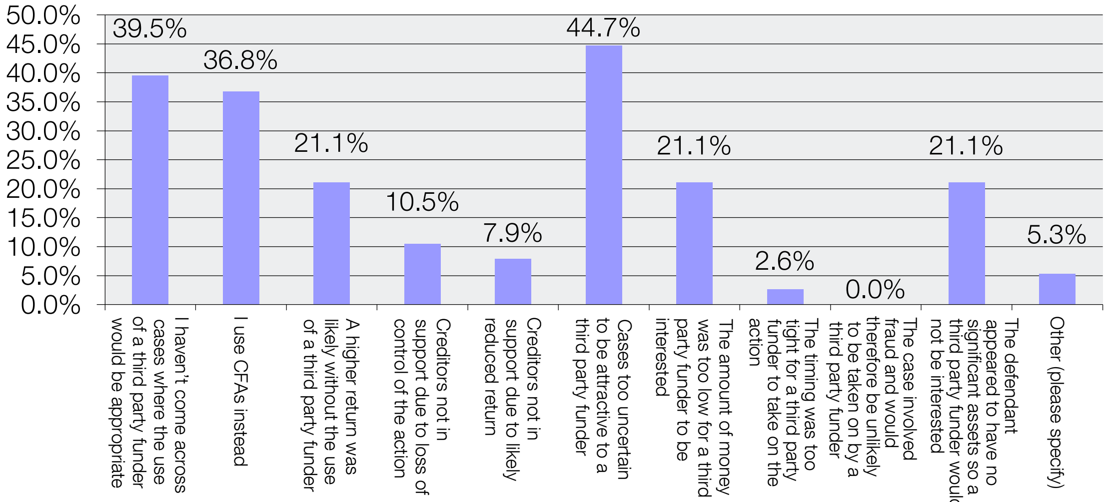
Question 13

Answered by all who didn't use a third party funder last year

Which of the reasons listed below, if any, explain why you have not undertaken any insolvency litigation using a third party funder in the past 12 months? Please select all that apply.

Answer Options	Response Percent	Response Count
I haven't come across cases where the use of a third party funder would be appropriate	39.5%	15
I use CFAs instead	36.8%	14
A higher return was likely without the use of a third party funder	21.1%	8
Creditors not in support due to loss of control of the action	10.5%	4
Creditors not in support due to likely reduced return	7.9%	3
Cases too uncertain to be attractive to a third party funder	44.7%	17
The amount of money was too low for a third party funder to be interested	21.1%	8
The timing was too tight for a third party funder to take on the action	2.6%	1
The case involved fraud and would therefore be unlikely to be taken on by a third party funder	0.0%	0
The defendant appeared to have no significant assets so a third party funder would not be interested	21.1%	8
Other (please specify)	5.3%	2
	answered question	**38**
	skipped question	**299**

Which of the reasons listed below, if any, explain why you have not undertaken any insolvency litigation using a third party funder in the past 12 months? Please select all that apply.



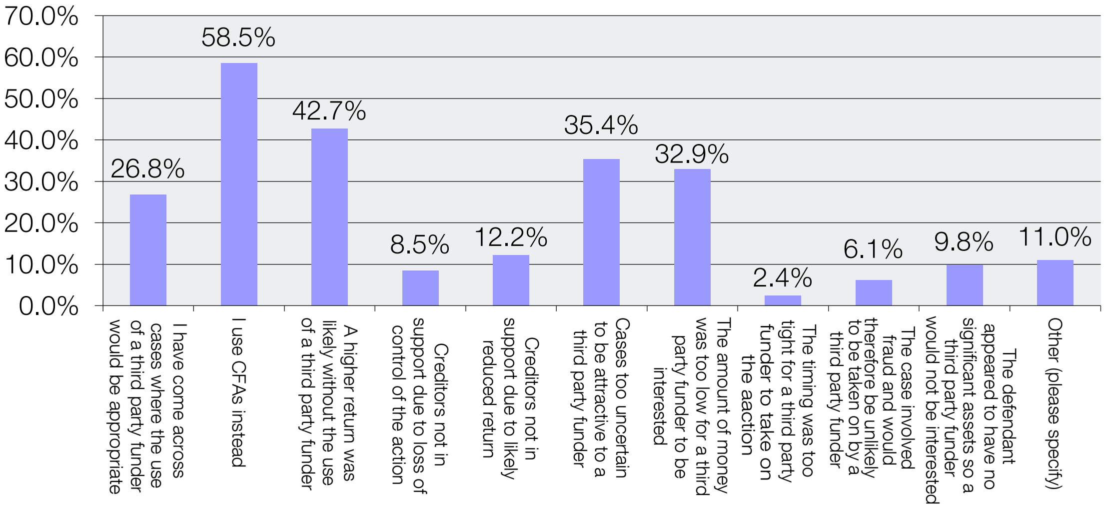
Question 14

Answered by those who have never used a third party funder

Which of the reasons listed below, if any, explain why you have not undertaken any insolvency litigation using a third party funder? Please select all that apply.

Answer Options	Response Percent	Response Count
I haven't come across cases where the use of a third party funder would be appropriate	26.8%	22
I use CFAs instead	58.5%	48
A higher return was likely without the use of a third party funder	42.7%	35
Creditors not in support due to loss of control of the action	8.5%	7
Creditors not in support due to likely reduced return	12.2%	10
Cases too uncertain to be attractive to a third party funder	35.4%	29
The amount of money was too low for a third party funder to be interested	32.9%	27
The timing was too tight for a third party funder to take on the action	2.4%	2
The case involved fraud and would therefore be unlikely to be taken on by a third party funder	6.1%	5
The defendant appeared to have no significant assets so a third party funder would not be interested	9.8%	8
Other (please specify)	11.0%	9
	answered question	**82**
	skipped question	**255**

Which of the reasons listed below, if any, explain why you have not undertaken any insolvency litigation using a third party funder? Please select all that apply.

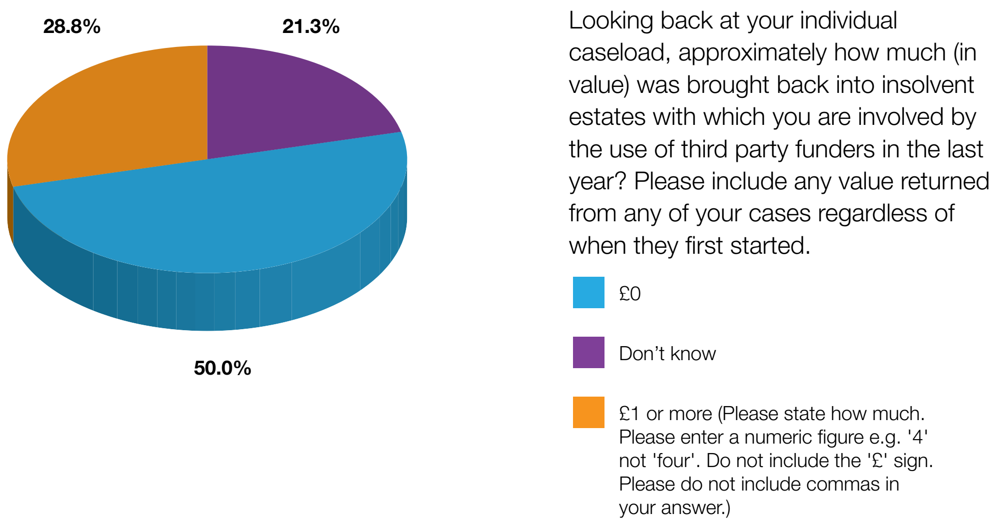


Question 15

Answered by all those who have used a third party funder

Looking back at your individual caseload, approximately how much (in value) was brought back into insolvent estates with which you are involved by the use of third party funders in the last year? Please include any value returned from any of your cases regardless of when they first started.

Answer Options	Response Percent	Response Count
£0	50.0%	40
Don’t know	21.3%	17
£1 or more (Please state how much. Please enter a numeric figure e.g. ‘4’ not ‘four’. Do not include the ‘£’ sign. Please do not include commas in your answer.)	28.8%	23
	answered question	**80**
	skipped question	**257**



Total	£17,965,966.00
Mean	£816,634.82
Median	175,000
% of total returns	9.29%

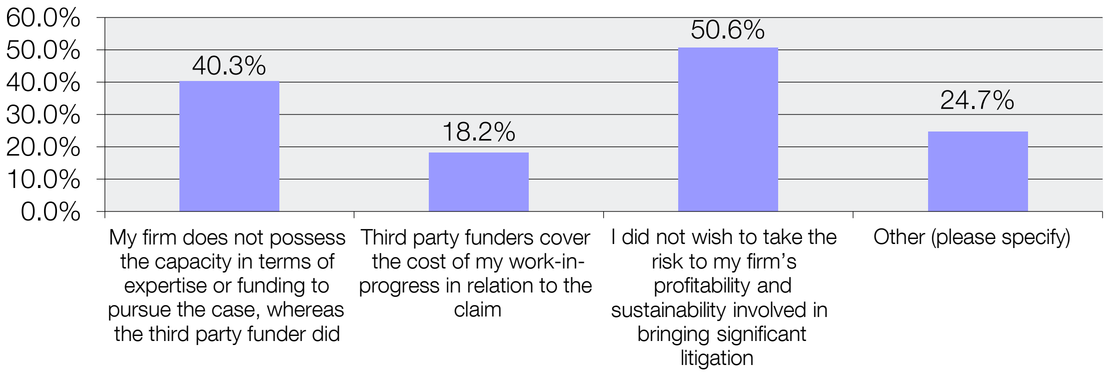
Question 16

Answered by those who have used a third party funder

Thinking about times when you have used a third party funder, what factors influenced your decision to use a third party funder? Please select all that apply.

Answer Options	Response Percent	Response Count
My firm does not possess the capacity in terms of expertise or funding to pursue the case, whereas the third party funder did	40.3%	31
Third party funders cover the cost of my work-in-progress in relation to the claim	18.2%	14
I did not wish to take the risk to my firm's profitability and sustainability involved in bringing significant litigation	50.6%	39
Other (please specify)	24.7%	19
answered question		**77**
skipped question		**260**

Thinking about times when you have used a third party funder, what factors influenced your decision to use a third party funder? Please select all that apply.

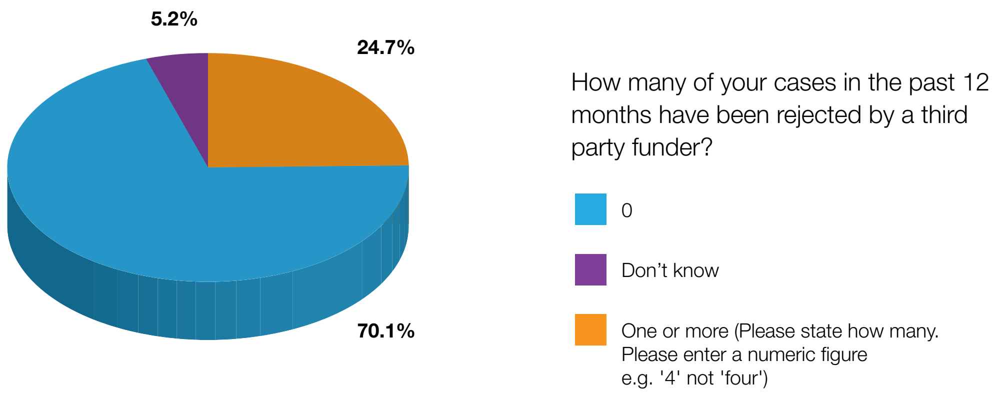


Question 17

Answered by those who have used a third party funder

How many of your cases in the past 12 months have been rejected by a third party funder?

Answer Options	Response Percent	Response Count
0	70.1%	54
Don't know	5.2%	4
One or more (Please state how many. Please enter a numeric figure e.g. '4' not 'four')	24.7%	19
answered question		**77**
skipped question		**260**



Of those who had cases rejected

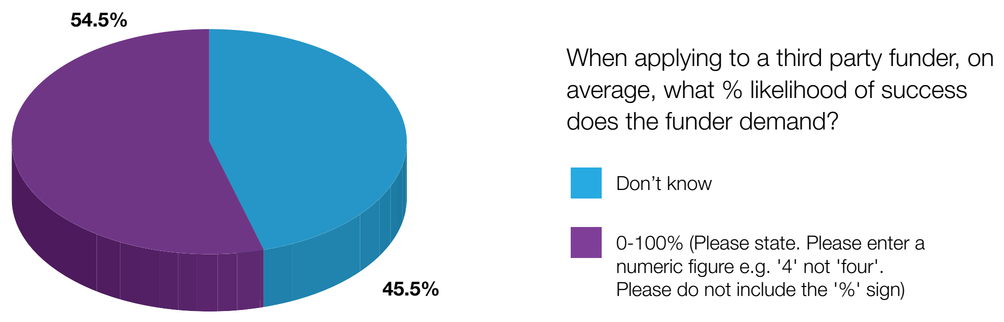
Total	28
Mean	1.47
Median	1
Mode	1
% of cases undertaken	43.75%

Question 18

Answered by those that have used third party funders

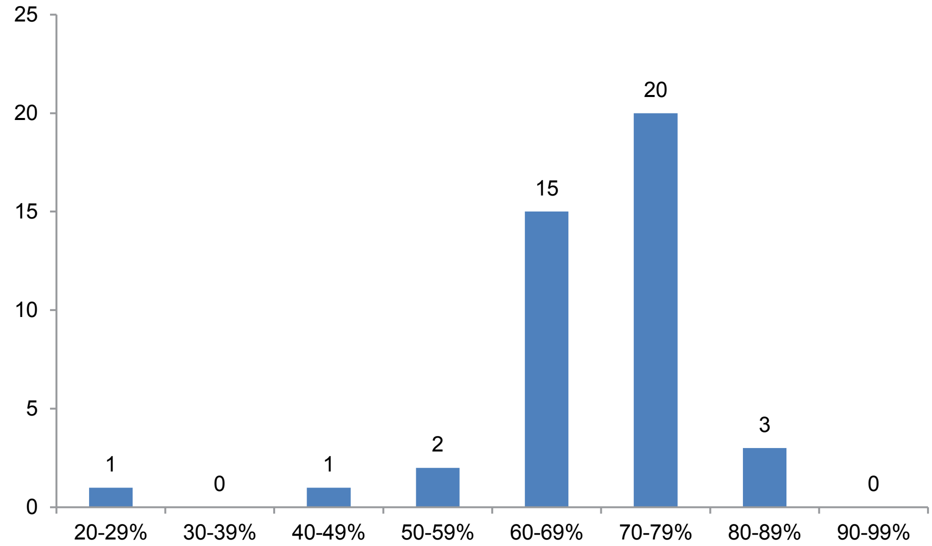
When applying to a third party funder, on average, what % likelihood of success does the funder demand?

Answer Options	Response Percent	Response Count
Don't know	45.5%	35
0-100% (Please state. Please enter a numeric figure e.g. '4' not 'four'. Please do not include the '%' sign)	54.5%	42
answered question		**77**
skipped question		**260**



Mean	66%
Median	70%
Mode	70%

Average % chance of success demanded by third party funders before funding



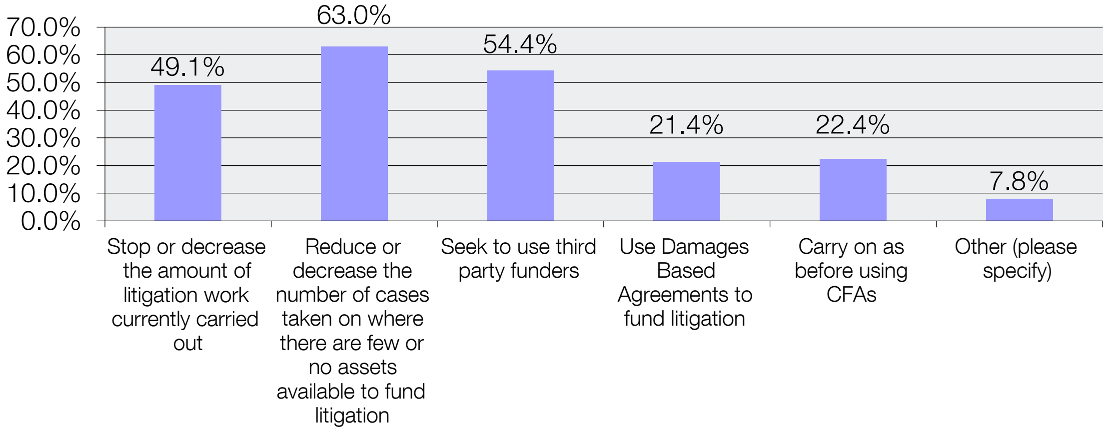
Question 19

Answered by all

If the ‘insolvency exemption’ ends would you? Please select all that apply

Answer Options	Response Percent	Response Count
Stop or decrease the amount of litigation work currently carried out	49.1%	138
Reduce or decrease the number of cases taken on where there are few or no assets available to fund litigation	63.0%	177
Seek to use third party funders	54.4%	153
Use Damages Based Agreements to fund litigation	21.4%	60
Carry on as before using CFAs	22.4%	63
Other (please specify)	7.8%	22
answered question		**281**
skipped question		**56**

If the ‘insolvency exemption’ ends would you? Please select all that apply

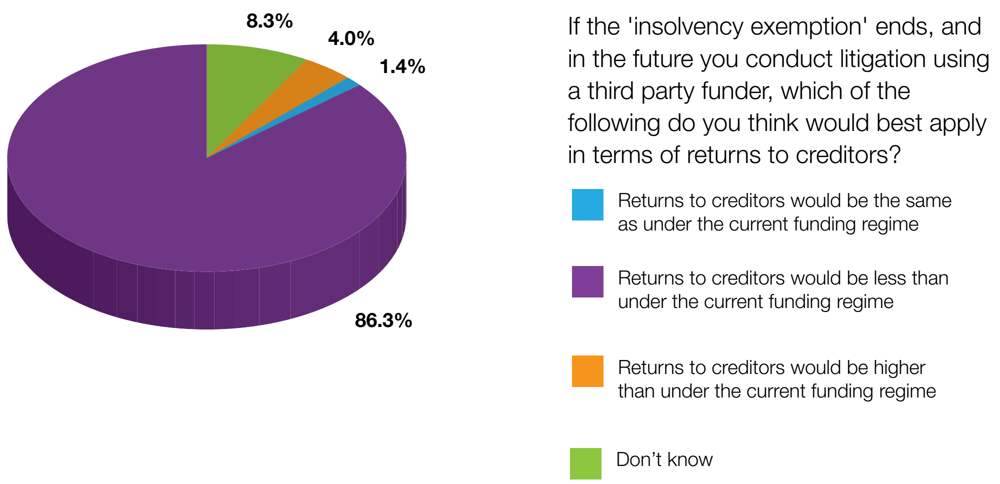


Question 20

Answered by all

If the ‘insolvency exemption’ ends, and in the future you conduct litigation using a third party funder, which of the following do you think would best apply in terms of returns to creditors?

Answer Options	Response Percent	Response Count
Returns to creditors would be the same as under the current funding regime	1.4%	4
Returns to creditors would be less than under the current funding regime	86.3%	239
Returns to creditors would be higher than under the current funding regime	4.0%	11
Don’t know	8.3%	23
	answered question	**277**
	skipped question	**60**

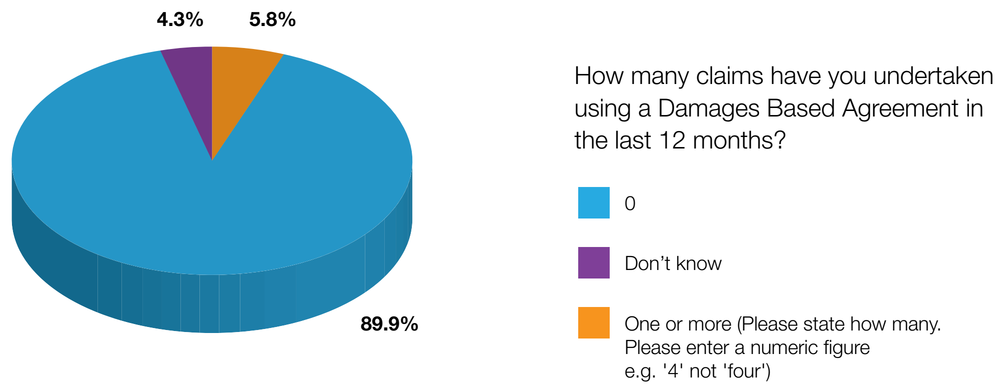


Question 21

Answered by all

How many claims have you undertaken using a Damages Based Agreement in the last 12 months?

Answer Options	Response Percent	Response Count
0	89.9%	249
Don't know	4.3%	12
One or more (Please state how many. Please enter a numeric figure e.g. '4' not 'four').	5.8%	16
answered question		**277**
skipped question		**60**



Of those who have used a DBA

Total	30
Mean	1.875
Median	1
Mode	1

Question 22

Answered by all

The uncertainty surrounding the 'insolvency exemption' has led to the following consequences... (Please select all that apply).

Answer Options	Response Percent	Response Count
I have taken on more cases	4.4%	12
I have taken on fewer cases	17.0%	46
I have made enquiries of third party funders more than I would have done previously	48.5%	131
The costs of ATE insurance have increased	37.8%	102
Other (please specify)	20.7%	56
answered question		**270**
skipped question		**67**

The uncertainty surrounding the 'insolvency exemption' has led to the following consequences... (Please select all that apply).